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Achieving Equality for Women in Labour and Employment – A Comparative Study of Colombia and Canada

Lina M. Hernandez
The University of Western Ontario

Supervisor
Valerie Oosterveld
The University of Western Ontario

Graduate Program in Law

A thesis submitted in partial fulfillment of the requirements for the degree in Master of Laws

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ABSTRACT

The primary focus of this thesis is to analyze and compare the legal systems enacted to protect working women in Colombia and Canada. This thesis focuses on: the protection of maternity and parental rights; the principle of equal pay for work of equal value; and discrimination in employment (including harassment). This research argues that the legislative and judicial changes made in each country to protect working women have not led to substantive equality for working women. This thesis also argues that there is a gap between international and national standards, thus a law reform is appropriate and needed in both the Canadian and Colombian legal systems to bridge the gap and achieve equality for women in employment. Overall, this thesis provides a holistic understanding of two different legal systems in two different countries, both State parties to important International Labour Organization (ILO) and United Nations Organization (UN) treaties and with the same international goal of attaining equality for women in employment.

KEYWORDS

Women, Feminist Jurisprudence, Colombia, Canada, International Labour Organization, United Nations Organization, Equality, Employment, Labour, Laws, Comparative Studies, Discrimination, Pay Equity, Maternity Leave, Wage Gap.

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I dedicate this thesis to my children, John P. and Nicholas Potes Hernandez; my husband Camilo J. Potes and my parents Orlando Hernandez and Ketty Constantin.

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P. PREFACE

“No learning ever was bestow’d on me; my life was always spend in Drudgery; and not alone; alas! With Grief, I find, it is the portion of poor women kind.”¹

In 1739, an English poet, Mary Collier, wrote a sonnet called, “The Woman’s Labour an Epistle to Mr. Stephen Duck”, reflecting the pessimistic reality of a working woman in the eighteenth century. Since that time, women’s rights and domestic employment legislation have developed significantly, changing the reality of many working women. However, the fragment of the poem introduced above stills holds true for many women around the world, and contextualizes the vast and difficult process that has been the recognition and development of working women’s rights. The object of this LL.M. research is to explore the extent to which labour and employment laws as currently constituted succeed, and fail to succeed, in achieving equality at work for female workers in Colombia and Canada. Specifically, this thesis will provide insight in three main areas: protection to the rights of pregnant employees; equal pay for work of equal value; and discrimination. Before this thesis turns to an examination of these three topics in detail, this preface will provide an introduction to the research questions posed in this thesis. It will then set out significant concepts used in the thesis. First, this thesis uses as its baseline of measurement international human rights law on equality of working women that has been accepted by Canada and Colombia, and this preface will provide general background as to why this type of baseline measurement is used. More detailed descriptions of the substantive international law are included in the initial section of each chapter. Second, this thesis studies the legal systems in Canada and Colombia with respect to labour and employment law relating to working women, and therefore this preface explains the general structure of those systems, so as to provide helpful context for the more thorough explanations in subsequent chapters. Third and finally, this preface sets out the underlying methodology for this thesis: namely, a combination of feminist legal analysis of relevant jurisprudence (referred to as feminist

¹ Mary Collier, *The Woman’s Labour to Mr. Stephen Duck* (London, UK: Printed for the author and fold by J. Roberts, in Warwick-lane and at the Pamphlet-Shops near the Royal Exchange, 1739).

jurisprudence study) and comparative studies. The preface will end by setting out the structure for the remainder of the thesis.

P.1 Research Questions

The research questions for this thesis can be considered to be layered. In general terms, this thesis will compare the legal systems of Canada and Colombia, which share international obligations and a common goal: attaining equality for female workers. In particular, this thesis aims to answer two questions: first, what are the similarities and differences in women's equality rights in existing labour and employment legislation in Colombia and Canada, and have these laws led to substantive equality? And, second, how do these rights compare with rights granted under international labour law? This thesis will consider whether there is a gap between the international and national standards and will explore whether law reform is needed in Canada and/or Colombia to bridge the gap.

The goal of this thesis is to provide a holistic, global, "out of the cave"² comparison of two different countries with different legal systems, different political and economic organization, and a different overall geopolitical location. However, despite the many differences, both countries have accepted international obligations containing the same international goal of attaining equality for women in all areas, including employment. With this mutual goal as the basis for the comparison, this thesis will analyze the different domestic legal systems enacted by each country to achieve it. This work will focus on specific areas of employment law: the protection of pregnancy and maternity rights of working women; equal pay for work of equal value and the wage gap; and discrimination and harassment in the workplace. Each theme will be addressed in three

² Yntema Hessel E, "Comparative Legal Research: Some Remarks on Looking out of the Cave" (1956) 54:7 Mich Law Rev 897. In this article, Hessel explains that "Plato's allegory of the cave, that contrasts the shadow world of appearances with the realities of reason, is an appropriate text to invite consideration of the relation between "comparative law" and legal research. It suggests that we should look out of the cave and give realistic consideration to the problems of legal research, and not merely indulge in polite exchange of mutual satisfaction with things as they are." At 899. He also states that "[e]mbracing foreign legal systems, has an universal humanistic outlook, not delimited by political frontiers; it contemplates that, while techniques may vary, the problems of justice are basically the same in time and space throughout the world." At 903.

different chapters. The thesis will conclude with a final chapter containing the results and reflections of the comparison.

P.2 International Law as a Baseline for Measurement of Canada and Colombia

Over the last century, women have increased their participation in paid labour activities to support themselves and their families.³ However, the process of moving from the private realm of their homes, where their labour activities were unpaid and limited, to the public realm of paid labour,⁴ did not come without struggle. Indeed, paid workplaces were largely structured to accommodate the needs of working men, with the assumption that their role in society was that of the sole breadwinners for their homes and families.⁵ With the increased participation of women in the workplace, female voices were initially viewed as nuisances for the *status quo* of organizations,⁶ challenging employers to adapt their organizational culture and to accommodate the needs of female employees. This was the start of a long process that remains current today. This research will explore the current results of that process of including women in the paid workplaces in two countries: Canada and Colombia. However, it will do so by measuring this progress against international human rights law standards.

One of the most important steps in the global evolution of women's rights was the recognition, by international organizations,⁷ that women's rights are human rights;⁸ and as such they share the same general principles of universality, inalienability, equality, non-discrimination, indivisibility, interdependence and interrelatedness.⁹ Based on this recognition, the international community – through the International Labour

³ Rosemary A Venne, "A Half Century of Work Women in the Labour Force" (2004) 67 Sask Law Rev 489 at 4,5.

⁴ Susan B Boyd, "Can Law Challenge the Public/Private Divide? Women, Work and Family" (1996) 15 Windsor Yearb Access Justice 161 at 169.

⁵ *Ibid* at 170.

⁶ *Ibid*.

⁷ UNOR, *Report of the World Conference of the International Women's Year*, Doc/E/Conf.66/34 (1976) at I (1). United Nations, ed, *Women's rights are human rights* (New York; Geneva: United Nations, 2014).

⁸ *Ibid*.

⁹ Christine Chinkin & Marsha A Freeman, "Introduction" in *UN Conv Elimin Forms Discrim Women - Comment* (New York: Oxford University Press Inc., 2012) at 6.

Organization (ILO) and the United Nations (UN) - initiated the important process of promoting women's rights in, among other areas, employment, through treaties and other documents aimed at achieving equality and eliminating all forms of discrimination. Key treaties include: The Universal Declaration of Human Rights;¹⁰ The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW);¹¹ The International Covenant on Civil and Political Rights;¹² The International Covenant on Economic, Social and Cultural Rights;¹³ Convention (No.111) Concerning Discrimination in Respect of Employment and Occupation;¹⁴ and Convention (No.100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value.¹⁵

Despite the importance and the impact of women's work as an essential part of their development as individuals, and for the development of the society in which they live,¹⁶ equality is yet to be achieved for many female employees in both the Canadian and Colombian workplaces. Indeed, the treaty body for CEDAW, known as the CEDAW Committee, has indicated that female employees in Canada and Colombia are often victims of disparate treatment because of their sex.¹⁷

In Canada's case, in 2016, the CEDAW Committee recommended the creation of a comprehensive national gender strategy, policy and action plan to address the structural factors that cause inequality with respect to women and girls.¹⁸ The Committee stated

¹⁰ *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No13, UN Doc A/810 (1948), 10 December 1948 [UDHR].

¹¹ *Convention on the Elimination of all Forms of Discrimination against Women*, 18 December 1979, GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980) [CEDAW].

¹² *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 172 [ICCPR].

¹³ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, CAN TS 1996 No. 46 [ICESCR].

¹⁴ *Convention (No.111) concerning discrimination in respect of employment and occupation*, 25 June 1958, 362 UNTS 31 (ILO) [ILO Convention No. 111].

¹⁵ *Convention (No.100) concerning equal remuneration for men and women workers for work of equal value*, 23 May 1953, 165 UNTS 303 [ILO Convention No.100].

¹⁶ UNOR, *supra* note 7 at I (15).

¹⁷ *Concluding Observations on the combined eighth and ninth Periodic Reports of Canada*, UNOR, CEDAW/C/CAN/CO/8-9, 2016 [CEDAW Concluding Observations on 8th and 9th reports of Canada]. And *Concluding Observations on the combined seventh and eighth reports for Colombia*, UNOR, CEDAW/C/COL/CO/7-8, 2013 [Concluding Observations on the 7th and 8th reports of Colombia].

¹⁸ *CEDAW Concluding Observations on 8th and 9th reports of Canada*, *supra* note 17 at 21(b).

its concern about the slow process made in the paid employment, and cited special areas of alarm such as: the persistent wage gap; the lack of effective legislation on the principle of equal pay for work of equal value at the federal and provincial levels; the continuing vertical and horizontal occupational segregation; the high concentration of women working in part-time and low-paid jobs, due to child-raising and caretaking responsibilities; the low representation of women in managerial positions; the lack of affordable childcare; and the prevalence of sexual harassment in the workplace and lack of effective measures to prevent it.¹⁹

The CEDAW Committee has also expressed concerns with respect to the visibility of the Convention and the Optional Protocol within Canada's legal system:

[t]he Committee remains concerned that the provisions of the Convention, the Optional Protocol thereto and the Committee's general recommendations are not sufficiently known in the State party, including by women themselves. The Committee is further concerned that the Convention may not be directly invoked before national courts.²⁰

The Committee recommended that Canada establish "an effective mechanism aimed at ensuring accountability and the transparent, coherent and consistent implementation of the Convention throughout its territory."²¹ This includes training for adjudicators and lawyers about the content of the Convention, its Optional Protocol and general recommendations.²²

Aligned with the Committee's recommendations, the Supreme Court of Canada has recognized the importance of referring to international standards, specifically when interpreting the rights in the Charter. For example, in *Suresh v. Canada (Minister of Citizenship and Immigration)*,²³ the Court explained that Canada's international obligations should help courts with interpreting the rights protected by the Charter, as it is a tool for the implementation of international human rights obligations to which

¹⁹ *Ibid* at 38.

²⁰ *Concluding Observations on the combined eighth and ninth Periodic Reports of Canada, UNOR, CEDAW/C/CAN/CO/8-9*, 2016 [*CEDAW Concluding Observations on 8th and 9th reports of Canada*] at para 8.

²¹ *Ibid* at 9.

²² *Ibid* at para 9, 10.

²³ *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3 (SCC) (available on <http://canlii.ca/t/51wf>) at para 46.

Canada is bound.²⁴ Furthermore, in a different decision, the Court stated that “Canada’s current international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the Charter”.²⁵ These decisions and the CEDAW Committee’s recommendations speak to the importance of recognizing and integrating international labour standards into court decisions.

In 2013, the Committee made a similar recommendation to the government of Colombia by asking it to “develop a comprehensive strategy targeted at women, men, girls and boys to overcome patriarchal and gender-based stereotypical attitudes about the roles and responsibilities of women and men in the family and in society.”²⁶ With regard to the area of employment, the Committee’s concerns focused on issues such as: the high pay gap; the high female unemployment rate; high levels of occupational segregation; and the high percentage of the female population working in the informal sector with no access to social security benefits.²⁷

The Committee’s reports and recommendations indicate that the subject of gender inequality in the field of employment continues to be relevant for Canada and Colombia. It is for this reason that this thesis uses international human rights law as a standard baseline against which progress for equality of working women in Canada and Colombia is measured. In the search for equality, the UN and ILO have crafted international treaties, regulations and recommendations, urging State parties to implement changes within their own legal systems that will foster equality and eliminate discrimination for female employees.²⁸ Even though Colombia and Canada have different legal systems and forms of political organization, they both are parties to UN and ILO instruments and, as such, participate in the same goals and standards established to protect women’s rights.

²⁴ *Ibid.*

²⁵ *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, [2007] 2 SCR 391 (SCC) (available on <http://canlii.ca/t/1rqmf>) at para 78.

²⁶ *Concluding Observations on the 7th and 8th reports of Colombia*, *supra* note 17 at 14(1).

²⁷ *Ibid* at 27.

²⁸ UNOR, *supra* note 7 at 4–8.

Overall, international law is of central importance for enacted legal systems in Colombia and in Canada. In Canada, as explained earlier, the Supreme Court has stated that “[t]he inquiry into the principles of fundamental justice is informed not only by Canadian experience and jurisprudence, but also by international law, including *jus cogens*.”²⁹ This statement calls for adjudicators to apply international law in all their decisions, taking into account the country’s international obligations and values as expressed in “[t]he various sources of international human rights law — declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, [and] customary norms” as incorporated into Canadian law.³⁰ In Colombia, due to the principle of the constitutional corpus, international human rights agreements ratified by the government are introduced directly into the Political Constitution, and thus into the domestic legal system. The principle is contained in article 93 of the Constitution, which states: “all constitutional rights and obligations should be interpreted using international human rights agreements ratified by Colombia.”³¹ Furthermore, in article 53, the Constitution refers specifically to international labour standards contained in international agreements: “international labour covenants, ratified by Colombia are part of the country’s domestic legal system.”³² It is clear that international legislation plays a key role in the interpretation of domestic legislation for adjudicators in both countries. It is therefore important for this thesis to briefly provide a legal and historical context of the evolution and different legal systems enacted in Colombia and in Canada. This introductory preface will now present a background on the evolution of women’s rights in the Colombian unitary civil law legal system as well as in the federal common law legal system of Canada.

P.3 Legal Framework Enacted to Protect Women’s Rights in Colombia

Article one of the Political Constitution of Colombia establishes that Colombia is organized politically as a democratic Republic, under the social rule of law.³³ It has a

²⁹ *Suresh v. Canada (Minister of Citizenship and Immigration)*, *supra* note 23 at para 46.

³⁰ *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, *supra* note 25 at para 78.

³¹ *Constitución Política de Colombia 1991*, *Gaceta Constitucional No. 127*, 10 October 1991 [Constitución de Colombia] at art 93.

³² *Ibid* at art 53.

³³ *Constitución Política de Colombia 1991*, *Gaceta Constitucional No. 127*, 10 octubre 1991 [Constitución de Colombia], art. 1.

unitary civil law system, where the primary role of the judge is to administer justice by applying the law to the specific behaviour of individuals. The current legal system in Colombia is historically based on the concepts of natural law, known as *jusnaturalism*. It was introduced in Latin America as a part of the colonial process, and it was the main, if not the only, line of jurisprudence present in the region for the duration of the Colonial Era.³⁴ During this period, the region came under Spain's control, imposing Roman Catholic-based lines of jurisprudence, such as those contained in St. Thomas Aquinas' *Summa Theologiae*. Under Aquinas' doctrine, "[n]atural law is the same for all men, since we are all rational and it is proper for men to be inclined to act according to reason."³⁵ In the language of this statement, it is immediately noticeable that women are excluded from the definition of equality. This is a good representation of the position that women's rights had in the emerging Latin American legal systems based on Aristotelian and Aquinian concepts of natural law doctrines. The imposition of these principles did not have a space for the development of legal doctrines that consider the unique reality and needs of women; in fact, women were not considered part of the legal system because they were not considered as persons by the law.

After colonialism, the independence movement, prevalent in most Latin American countries, introduced the precepts of 19th century positivism as a new philosophy of jurisprudence.³⁶ After the success of the independence movement, Latin American countries began to craft their constitutions, governments and legal systems, in the context of the debate between *juspositivism* and *jusnaturalism*. However, the debate did not advance the recognition of the women's rights, as women continued to be viewed as second-level members of society, with a specific role of child-bearing and caretaking of the home and the family.

During the XVII and XVIII centuries, classic *jusnaturalism* developed by adopting concepts from modern ideas in Europe, that defended the existence of common principles of what is "is" and what is "ought" and the human capacity to learn them

³⁴ Carlos I Massini Correas, "El *Iusnaturalismo* del Siglo XX" (2009) *Bibl Juridica Virtual Inst Investig Juridicas UNAM* 173.

³⁵ Michael Freeman FBA, *Lloyds Introduction to Jurisprudence*, 9th ed (London, UK: Thomson Reuters (Professional) UK Limited trading as Sweet & Maxwell, 2014).

³⁶ Massini Correas, *supra* note 24 at 173.

through rationalization and deduction. These new ideas fostered the codification process of the law with the purpose of transforming these inherent natural laws into positive laws.³⁷ Countries in Latin America, including Colombia, followed these principles and established the civil law or code of law legal system that remain in governance today.³⁸

The adoption of an established legal system did little to change the status of women in Colombia. It was not until the industrialization period, when women left their homes to join the workforce, that women in the women's rights movement began to express their opinions.³⁹ During this period, Colombia experienced important feminist movements, such as Fabricato's women workers' strike in 1920, when a group of female employees organized under the leadership of Betsabe Espinoza, and demanded an increase in their wages. The strike ended successfully and the women received a 40% increase.⁴⁰ After that, feminist groups strongly advocated for women's rights during the period between 1930 and 1957.⁴¹ Since then, the country has seen important legislative changes with regard to working women's rights, from access to education and property rights in the Constitution of 1886, to the recognition of the vote in 1954,⁴² to the adoption of equality rights in the Constitution of 1991.⁴³

Colombia has also enacted extensive legislation to protect the rights of women in the paid and unpaid labour markets. Examples of these are: Articles 13⁴⁴ and 43⁴⁵ of the Constitution, which create a legislative frame to protect the equality rights of all Colombians; article 43 on the equality of men and women; and article 53,⁴⁶ which

³⁷ Rodolfo Luis Vigo, *Iusnaturalismo y Neo constitucionalismo: Coincidencias y Diferencias* (Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM) at 852.

³⁸ *Ibid* at 853.

³⁹ Lola González Luna, "Los Movimientos de Mujeres: Feminismo y Feminidad en Colombia (1930-1943)" (1985) 35 Bol Am 169 at 171.

⁴⁰ *Ibid* at 173.

⁴¹ *Ibid* at 176.

⁴² *Ibid*.

⁴³ Rodrigo Uprimny, Paola Molano & Diana E Guzmán, *Camino a la Igualdad?: Derechos de las Mujeres a Partir de la Constitución de 1991 - Sistematización Legal y Jurisprudencial*, 2nd ed (Bogotá, Colombia: Entidad de las Naciones Unidas para la Igualdad de Género y el Empoderamiento de las Mujeres - ONU Mujeres, 2015) at 11.

⁴⁴ *Constitución de Colombia*, *supra* note 23, p art. 13.

⁴⁵ *Ibid*, p art. 43.

⁴⁶ *Ibid*, p art. 53.

protects the equal opportunity of all workers and creates a special constitutional protection for female employees and maternity. It is worth noting that the Constitution of 1991 focused on the protection of human rights in Colombia and, to forward this goal, it adopted concepts from the French doctrine, such as the constitutional corpus principle,⁴⁷ and concepts from the common-law legal system.⁴⁸ Indeed, the Constitution adopted from the common-law doctrine the recognition of jurisprudence from the Supreme and Constitutional Courts as essential to the interpretation of the law.⁴⁹ This evolution of the Colombian civil code legal system combines the judicial, empiric, inductive interpretation process of the common law with the legislative, deductive, and conceptual interpretation process of the Colombian legal system.⁵⁰ The constitutional corpus principle was adopted into the Colombian legal system with the purpose of facilitating the immediate incorporation of certain human rights-related international agreements into the domestic legal system after ratification by the government. Therefore, some international human rights agreements and conventions, such as CEDAW and the Universal Declaration of Human Rights, are considered an integral part of the Political Constitution and are incorporated into the legal system after their formal ratification.⁵¹

After providing a brief background of the legal system currently implemented in Colombia to protect human rights and specifically women's rights, this introduction will now provide a brief description of the legal system implemented in Canada with the same purpose.

⁴⁷ Rodrigo Uprimny, "El bloque de constitucionalidad en Colombia - Un análisis jurisprudencial y un ensayo de sistematización doctrinal." (2005) Univ Nac - ENS Colomb Curso Form Promot Derechos Hum Lib Sind Trab Decente at 14,13.

⁴⁸ Uprimny, Molano & Guzmán, *supra* note 33 at 14.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Uprimny, *supra* note 37 at 14–16.

P.4 Legal Framework Enacted to Protect Women's Rights in Canada

In Canada, both the federal and provincial governments have authority over labour and employment law.⁵² The Constitution gives federal jurisdiction over employment to industries such as federal Crown corporations, TV broadcasting, radio, shipping, as well as any form of transportation that crosses provincial boundaries.⁵³ Employment laws that regulate the rights and obligations of non-unionized workers and employers are assigned to provincial or territorial jurisdiction due to the constitutional division of powers. For example, in Ontario, the non-unionized workplace is regulated by the common law⁵⁴ and five primary provincial laws: The Employment Standards Act; the Occupational Health and Safety Act; the Pay Equity Act; and the Human Rights Code.⁵⁵ Even though provincial legislation varies across Canada, the differences are not large.

Since the end of the XIX century, Canadian women have been searching to exercise their human rights by joining the paid workforce to support themselves and their families, and to develop their careers. In the late 1960s, women's groups advocated for the recognition of equality rights, and as a result, on February 16, 1967, the federal government organized the Royal Commission on the Status of Women "to ensure for women equal opportunities with men in all aspects of Canadian Society."⁵⁶ Chaired by CBC broadcaster Florence Bird, the Commission examined the reality of women in Canada in light of the general international principle that "all human beings are born free and equal in dignity and rights" as established by the Universal Declaration of

⁵² At the federal level, both unionized and non-unionized workplaces are governed by the Canada Labour Code. At a provincial level, most workplaces are governed by provincial law and each province has its own legislation governing unionized workplaces. Unionized workplaces are governed by their collective agreement and the relevant provincial employment legislation. See Mark Edelstein, "Unionized Versus Non-Unionized Workplace", *Employ Law Can WeirFoulds LLP* (2011) 44 at 26. Employment law is assigned to provincial jurisdiction due to the constitutional division of powers.

⁵³ *The Constitution Act, 1867*, 30 & 31 Vict, c 3 [*The Constitution Act 1867*] at s 91, 92.

⁵⁴ Law system based on custom and judicial precedent

⁵⁵ *Employment Standards Act, 2000*, SO 2000, c 41 [*Employment Standards Act, 2000*, SO 2000, c 41]; *Occupational Health and Safety Act*, RSO 1990, c O.1 [*Occupational Health and Safety Act*, RSO 1990, c O.1]; *Pay Equity Act*, RSO 1990, c P.7 [*Pay Equity Act*, RSO 1990, c P.7]; *Human Rights Code*, RSO 1990, c H.19 [*Human Rights Code*, RSO 1990, c H.19].

⁵⁶ Florence Bird et al, *Report of the Royal Commission on the Status of Women in Canada* (Ottawa: Privy Council Office, 1970).

Human Rights.⁵⁷ In 1970, the Commission produced a report containing 167 recommendations to foster equality for women. These recommendations included subjects such as: guaranteed income for single mothers; a national childcare system; the inclusion of disabled women; full equality in access to education, employment and participation in politics; and equal pay.⁵⁸ The report marked an important change in Canada's history towards the recognition of women's rights: "it turned Canada in a new direction, launched hundreds of parliamentary initiatives, spurred the development of grassroots feminist organizations and stimulated conversation about women's rights that still echoes ever more faintly today".⁵⁹

One of the most important issues for working women in Canada is the securing of appropriate remuneration for work performed in the paid labour force. The Royal Commission on Equality in Employment, known as 'The Abella Commission' and chaired by Madame Justice Rosalie Abella, submitted a report in 1984, crafting the term "employment equity" and producing recommendations to achieve it.⁶⁰ The report was the base of the 1986 Employment Equity Act, later amended in 1995.⁶¹

Since then, Canada has taken important steps to achieve equality for women in employment; examples of these efforts are: the implementation of employment and pay equity legislation; maternity and parental leave legislation; and the implementation of antidiscrimination laws at the federal and provincial levels. Furthermore, ground breaking jurisprudence has been produced by the Supreme Court of Canada, recognizing the importance of the participation of women in the paid workforce. Decisions such as *Brooks*,⁶² *Meiorin*,⁶³ *Janzen*⁶⁴ and *Robichaud*⁶⁵ have established key

⁵⁷ *UDHR*, *supra* note 10 at 1.

⁵⁸ Bird et al, *supra* note 46 at 10.

⁵⁹ Michelle Landsberg, "Blueprint for Equality Launched", *Herizons Mag Inc* (Spring 2015) 45.

⁶⁰ Judge Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report* (Commission on Equality in Employment, 1985).

⁶¹ *Employment Equity Act*, SC 1995, c 44 [*Employment Equity Act*, SC 1995, c 44].

⁶² *Brooks v Canada Safeway LTD*, [1989] 96 CanLII (1 SCR 183) (1978 CanLII 25 (SCC)) (available on <https://www.canlii.org/en/ca/scc/doc/1989/1989canlii96/1989canlii96.pdf>). [Brooks]

⁶³ *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 (C) (available on <http://canlii.ca/t/1fqk1>). [Meiorin]

⁶⁴ *Janzen v Platy Enterprises LTD*, [1989] CanLII (SCR) (available on <http://www.canlii.org/en/ca/scc/doc/1989/1989canlii97/1989canlii97.pdf>). [Janzen]

⁶⁵ *Robichaud v Canada (Treasury Board)*, [1987] 2 SCR 84 (C) (available on <http://canlii.ca/t/1ftl5>). [Robichaud]

legal guidelines and remedies for women whose human rights have been breached by their employers. These decisions will be analysed in detail as part of subsequent chapters of this thesis.

The Supreme Court of Canada has also recognized that discrimination based on sex is a systemic issue and that it should be remedied as such by reviewing all elements in the employment relationship that could create discrimination for women.⁶⁶ The systemic nature of discrimination, however, is difficult to identify because it has been normalized by the stereotypical gender roles that are part of the work culture in Canada.⁶⁷

Despite Canada's efforts through litigation and legislation; international organizations have reported that Canadian women continue to be subjected to discrimination and inequality due to their sex in all areas, including employment.⁶⁸

The preface has set out the general topic of this thesis, and has provided a brief outline of the legal structures of Canada and Colombia's labour and employment laws. The next part of the introduction will provide a brief review of the feminist literature related to the research subject under scrutiny.

P.5 Feminist Jurisprudence

This thesis is primarily a work that can be placed within the legal doctrine of feminist jurisprudence, broadly placed inside comparative law, and specifically located within the consideration of domestic employment and labour law as measured against international human rights law. This section will explain how this thesis is situated within an analysis of feminist jurisprudence. Section P.6 will discuss the comparative studies methodology also used within this thesis. Chapters 1, 2 and 3 provide the international and domestic human rights law background, and Chapter 4 pulls all of

⁶⁶ Meiorin, *supra* note 53 at 29.

⁶⁷ Christine Chinkin & Marsha A. Freeman, *supra* note 9 at 9,10. and CEDAW Concluding Observations on 8th and 9th reports of Canada, *supra* note 17.

⁶⁸ CEDAW Concluding Observations on 8th and 9th reports of Canada, *supra* note 17.

these modes of analysis – feminist jurisprudence, comparative studies and international/domestic – together.

Women's rights, as a subject of inquiry, has been vastly studied from different angles and disciplines, including through feminist legal analysis of jurisprudence,⁶⁹ referred to as 'feminist jurisprudence'. The purpose of feminist jurisprudential analysis in employment and labour legislation is to find answers to issues that women face in the workplace related to discrimination, harassment, pregnancy, access to equal opportunities and fair compensation, amongst other topics.⁷⁰

The importance of feminist jurisprudence is that it answers feminist questions with responses that take into consideration women's perspectives and experiences.⁷¹

However, that there is not one single, unified strand of feminist jurisprudence. The feminist movement has numerous lines and viewpoints that sometimes clash with each other. These different views, however, are positive in the development of feminist theory, because they take into account the different views and experiences of women.

There is no single school of feminist jurisprudence. Most feminists would agree that a diversity of voices is not only valuable, but essential, and that the search for, or belief in, one view, one voice is unlikely to capture the reality of women's experience of gender inequality.⁷²

⁶⁹ See Ann C Scales, "Towards a feminist jurisprudence" (1980) 56 Ind LJ 375; Linda J Krieger & Patricia N Cooney, "The Miller-Wohl controversy: Equal treatment, positive action and the meaning of women's equality" (1983) 13 Gold Gate UL Rev 513; Judith A Baer, "Feminist theory and the law" (2009) Oxf Handb Polit Sci, online: <<http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199604456.001.0001/oxfordhb-9780199604456-e-016>>; Ann C Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986) 95:7 Yale Law J 1373.

⁷⁰ Baer, *supra* note 59 at 4; Scales, *supra* note 59 at 376.

⁷¹ It is important to note that the experiences and the approaches of women to work is varied, and is impacted by intersectionality. Race, culture, religion, social status and disability are important personal characteristics that have a definitive impact and require a multilayered approach in all areas, including employment. For example, the process of black women achieving equality in employment was, and continues to be, impacted by the recognition of the rights of the black community as a whole; and secondly by the recognition of women's rights. Women in these groups face discrimination based on more than one protected characteristic, making them even more vulnerable to discrimination. Although important, the issue of intersectionality and its impact on feminist jurisprudence exceed the scope of this thesis; however, it does leave the door open for a continuation of research in these areas.

⁷² Hilary Charlesworth, Christine Chinkin & Shelley Wright, "Feminist Approaches to International Law" (1991) 85:4 Am J Int Law 613 at 613.

These differing approaches are grouped by Raymond Wacks in four main strands; i) Liberal feminism, ii) Radical feminism, iii) Postmodern feminism and iv) Difference feminism.⁷³ However, what they all have in common is the need to add women's opinions and experiences into the discussions of legal doctrine and state theory. These opinions have been ignored historically and left out from the process of crafting the environments that women are looking to access today, such as paid employment and politics.

For the last century, feminist jurists have pursued the feminist goal of questioning legislation that is part of a legal system designed by men to dominate women. This theory of male control of the legal environment rests on three main premises: firstly, legal doctrines have a fundamental male bias even if they are presented as gender neutral; secondly, women's lives and experiences are different from men's lives; and finally, legal doctrine fails to take into consideration women's experience and perceptions.⁷⁴ The acknowledgement of these premises will naturally generate a feminist overall distrust of the law, and a need to question its effectiveness in achieving equality. Thus, this thesis will question whether the current legal systems in Colombia and in Canada provide aid in achieving the goal of equality for female employees.

One of the most interesting debates in the feminist jurisprudential literature for the purposes of this thesis is the analysis of equality and disparate treatment from the "differences and sameness" approach.⁷⁵ The sameness versus difference theory, discuss the way that the law understands equality between women and men. A gender-neutral (sameness) approach makes an effort to recognize women's rights based on the fact that there is no substantive difference between men and women, and therefore the law

⁷³ Raymond Wacks, *Understanding Jurisprudence*, 2nd ed (New York: Oxford University Press Inc., 2009).at 361.

⁷⁴ Baer, *supra* note 59.

⁷⁵ Professor Catharine Mackinnon, explains that "inequality is substantive and identifies a disparity and difference is abstract and falsely symmetrical." She also argues that differences are the basis of male domination, both when they are affirmed or denied. She explains that the jurisprudence and the law have always viewed gender in the context of sameness and difference and this approach ignores the fact that gender is a system of imposed inequality of power. "like and unlike, similar and dissimilar have been the meta-metaphor through which the law has put its systemic norm of equal treatment in effect. Why should women have to be like men to be treated as equal citizens?". See Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) at 8,9. See also Scales, *supra* note 59.

should treat them as equal.⁷⁶ This approach, however, ignores the reality that women and men are biologically different by nature, hence causing debate in cases where women are placed in a unique position due to these differences, such as maternity, pregnancy and breastfeeding.⁷⁷ On the other hand, asking for special benefits specific to women workers might leave women excluded from jobs.⁷⁸ Overall, as explained by Scales, focusing on the sameness or differences between men and women is really not helpful in the advancement of equality rights for women; instead the law should craft a third view that focus on understanding and celebrating the natural characteristics of men and women.

Through our conscientious listing, we help to define real gender issues of our existence. Our aim must be to affirm differences as emergent and infinite. We must seek a legal system that works, and at the same time, makes differences a cause for celebration, not classification.⁷⁹

Indeed, Ann Scales, argues that these natural differences should not be ignored, nor used as classification of the differences between sexes; however, they should be acknowledged and understood by the law to positively accommodate the natural characteristics of women.

In the past, two legal choices appeared to resolve claims of social injustice: Law could either ignore differences, thereby risking needless conformity, or it could freeze differences, thereby creating a menu of justifications for inequality. Concrete universality eliminates the need for such a choice. When our priority is to understand differences and value multiplicity, we need only to discern between occasions of respect and occasions of oppression.⁸⁰

Chapter 1 of this thesis, will present the enacted legislation in Canada and Colombia, to protect the maternity rights of women in the workplace. It will also analyse cornerstone jurisprudence arguing that; to achieve real effective equality for female employees, legislation should embrace pluralism, and take into account the natural differences or characteristics of working men and women.

⁷⁶ Scales, explain that the differences approach emerged from the Aristotelian definition that Equality means to treat alike persons alike, and unlike persons unlike. This definition justifies a disparate treatment and places the responsibility of establishing the likeness amongst persons on the sovereign.

⁷⁷ Scales, *supra* note 59 at 1394.

⁷⁸ Baer, *supra* note 59 at 4.

⁷⁹ Scales, *supra* note 59 at 1376.

⁸⁰ *Ibid* at 1388.

Another important theory crafted by feminist scholars is the debarment of the existence of a natural objective reality that dictates the roles of women and men. They argue that there is no real natural objective reality that could possibly establish a concrete list of differences between sexes.⁸¹ As such, they call for a “system which avoids solipsism, and which recognizes that the subjectivity of the law-maker is not the whole of reality;”⁸² but rather applies a pluralistic approach that recognizes the existence of numerous potential different realities. In Canada and Colombia, women’s role in society has historically been to maintain and protect their homes, to procreate and educate the children and to take care of their husbands and parents. Domestic duties were their first approach to non-paid work, and positioned women as caregivers in the minds of many members of society. Feminism defines these perceptions of the roles of women as part of a patriarchal definition of the family, artificially created and imposed with the purpose of dominating women.⁸³ Currently, the historical stereotypical perceptions of women’s caretaker and domestic obligations has dissipated, but not disappeared, in Canada and Colombia. This research will analyse these factors in chapter 2, as they influence present issues such as the wage gap and employment segregation.

This thesis will continue with the feminist effort of questioning the law with the purpose of aiding in attaining the goal of achieving equality for working women. It will also present conclusions about how each country can adopt legal reforms in the field of labour and employment law to help create work environments that promote the diversity and development of all employees.

The above-noted examples are sufficient proof that inequality at work is a current complex issue for women at all levels in the Canadian and Colombian jurisdictions. Attaining equality in the workplace for women should be – and is - a priority for the two countries, not only because of the increasing participation of women in paid work, but also because researchers have established a clear connection between the equal

⁸¹ Scales, *supra* note 59.

⁸² *Ibid.*

⁸³ *Ibid.*

participation of women at work and the levels of poverty in a society. Indeed, as explained by Rachael Lorna Johnstone:

It is the spiralling effects of the initial discrimination (the under-investment by women in human capital, their lower pay, their lesser on-the-job training, their higher absence rates, etc.) that lead to macro inefficiency, i.e. welfare loss for society as a whole. Women's productivity is maintained at well below its potential. Total productivity is reduced.⁸⁴

Furthermore, the connection between women's employment and poverty levels was recognized by the Ontario Ministry of Labour in a background paper that stated that "Closing the gender wage gap will benefit the economy. It is viewed by some as a productivity gap when women are under-employed and/or not trained to their full potential, which causes productivity losses to the entire economy."⁸⁵ Despite this recognition, the advancement has been slow, and researchers find that despite legislative efforts, women continue to be subject of discrimination because of gender and family status.⁸⁶ This is sometimes due to an "unconscious bias that underscores all of the discussions, as social norms have created long held assumptions about the experiences and choices of women at work, in the home, and in daily life".⁸⁷

P.6 Comparative Studies Methodology

This thesis combines feminist jurisprudence methodology with another methodology: comparative studies. David J. Gerber, in his article titled 'System Dynamics: Toward a Language for Comparative Law',⁸⁸ explains that comparative studies - in particular comparative law - is becoming important in legal practice, as it creates a source of ideas for legal researchers on alternatives that have been implemented by different

⁸⁴ Rachael Lorna Johnstone, *Human Rights Working for Women* (Doctor of Juridical Science (SJD), University of Toronto, 2004) [unpublished].

⁸⁵ *Closing the Gender Wage Gap: A Background Paper* (Ministry of Labour, 2015).

⁸⁶ As explained by the Ministry of Labour *Ibid.* (research and anecdotal information point to the continued existence of systemic gender discrimination and biased societal attitudes towards women, whether conscious or unconscious. In terms of the gender wage gap, discrimination is often reflected in the undervaluation of women's work, and especially in the experiences of racialized and Aboriginal women, and women with a disability) at 30.

⁸⁷ *Ibid* at 32.

⁸⁸ David J Gerber, "System Dynamics: Toward a Language of Comparative Law" (1998) 46:4 Am J Comp Law 719.

jurisdictions and their outcomes.⁸⁹ Comparative studies also provide important methodology for examining the interpretation of common legal principles across different legal cultures, as well as potentially enlarging our understanding of the social impact of legal changes within a larger framework.⁹⁰ In his article, Gerber begins by stating that “goals and methods define intellectual disciplines and the communities associated with those disciplines,”⁹¹ hence the importance of identifying the most appropriate methodology to achieve the desired goals.

Comparative law is a field that has not developed as successfully as other fields. Gerber suggests that this is mainly caused by a developmental disjuncture in the relationship between objectives and methods used by jurists working on comparative law. In his opinion, legal scholars commence comparative law endeavours with four main objectives: conflict or international private law;⁹² unification of law;⁹³ transnational contractual relations;⁹⁴ and shaping or guiding domestic decisions.⁹⁵ The main objective of this thesis will focus on this last objective, as it will provide legal scholars and jurists with information about different legal approaches aimed toward the common goal of achieving equality for women at work. Ultimately, this thesis will contribute to the current state of legal knowledge on the rights of working women in Canada and Colombia.

Gerber also identifies barriers on the commonalities in the methodology of the four objectives of comparative law, particularly that the focus of the researchers is placed on the norms and not on the legal system itself.⁹⁶ This creates a significant issue, which is a lack of common purpose and generalizable knowledge.⁹⁷ With this issue in mind, this thesis will not focus only on comparing norms; it will first establish a common social

⁸⁹ *Ibid.*

⁹⁰ Hessel E., *supra* note 2.

⁹¹ Gerber, *supra* note 78.

⁹² Aim's is to determine which rules a court should apply in cases where norms of more than one legal system may have an application

⁹³ Knowledge of existing norms in the to-be unified jurisdictions and the differences between them.

⁹⁴ Produces knowledge that is used in deciding what language to use in a contract or what norms will apply to a contract in absence of a particular language.

⁹⁵ A source of ideas, providing decision makers with alternatives that have been tried in a different jurisdiction.

⁹⁶ Gerber, *supra* note 78 at 721.

⁹⁷ *Ibid* at 723.

function within the two counties. These goals or common social functions have been established and depicted in international agreements ratified by both Colombia and Canada. Identifying a common social function of the enacted norms will provide a basis for the comparisons. Gerber adds that the analyst is advised to consider the context in which each law operates to evaluate the operation of the norm, “this methodology will eliminate the extent to which the conceptualizations of the legal regimens being compared are corrupted in the process of comparison”.⁹⁸ Gerber concludes that sound objectives and methodologies will create a common language⁹⁹ for comparative law and will create benefits such as the capacity to create new legal knowledge. It will also help legitimate legal theory as different theoretical prepositions will be tested in more than one legal system, providing them with enough evidence of their validity or invalidity. By using the above-described methodology, this thesis aims to create new legal knowledge based on the experiences of Colombian and Canadian legislation created to achieve equality for women in the workplace.

This research was developed through a critical doctrinal analysis, to find the values and assumptions of labour and employment laws on women’s rights encompassed by domestic and international labour law. In the process of identifying the necessary information to complete the investigation, this research presents mainly legal primary sources existing in Canadian and Colombian jurisdictions. These include domestic legislation, regulations and cases. It also examines international labour and employment treaties which have been ratified by Canada and Colombia. Secondary sources include monographs, book chapters and law review articles on domestic and international labour and employment law on women’s human rights and on equality rights. While this research is mainly legal in focus, it also includes some non-legal sources to provide relevant background or supporting information, such as statistics and information on the historical development and background of feminist ideals that prompted a change in the legal treatment of women’s cases in the courts.

⁹⁸ Gerber, *supra* note 78.

⁹⁹ A common language develops where members of a community seek to explain aspects of the data or reality with which the deal.

P.7 Structure of the Thesis

This preface has discussed the research questions asked in this thesis, the reasoning for using international human rights law as a baseline for comparing domestic Canadian and Colombian laws governing equality rights for women in the paid workforce, and the two methodologies used within the thesis: feminist jurisprudence and comparative studies.

This thesis will now turn to an examination of maternity rights in chapter 1, followed by an analysis of the principle of equal pay for work of equal value and the wage gap in chapter 2, and an exploration of the issues caused by discrimination against women in the workplace in chapter 3. This research will end, in chapter 4, with final comparisons and conclusions of the Colombian and Canadian legal systems implemented to achieve equality for working women. Each chapter of this thesis presents an area of concern for working women, as well as, different legal approaches used by Canada and Colombia to address them. This research work will also present potential legislative solutions to achieve equality for women in the workplace.

CHAPTER 1

1. PROTECTION OF MATERNITY RIGHTS FOR WORKING WOMEN

Economic rights and the right to employment are recognized as human rights by United Nations (UN) Member States and, as such, are essential to the effective development of men and women as individuals.¹⁰⁰ To ensure that women have equal access to opportunity and employment, countries need to recognize that many women have a double role - a productive and reproductive - as well as the right to develop one or the other or both with complete freedom to make that decision without any pressure. United Nations Member States also place the responsibility on their own governments to ensure that women who join the paid labour force can balance their work and family responsibilities effectively.¹⁰¹

Women have been increasingly joining the paid labour for the past century; adding their voices to a paternalistic, male-created environment initially hostile to them, but which has adapted slowly to the evolution of society and the needs of the economy. Women's experiences in the paid work environment are unique and different than that of men for many reasons, but primarily because of the natural differences between men and women.¹⁰² One of these natural differences is the fact that only women experience pregnancy; as only women are able to become pregnant. As such, pregnancy and maternity are intrinsically linked to women, in all areas of their life including in employment, and cannot be ignored by employers and policy makers. The Supreme Court of Canada condemns all forms of discrimination against women and recognizes discrimination of pregnant employees as a form of sex discrimination.¹⁰³

This chapter will present and compare the existing maternity protection legislation in Canada and in Colombia. The first part of the chapter will establish common social goal or standards that are applicable to the two countries. Common goals will be based on

¹⁰⁰ *Beijing Declaration and Platform for Action*, UNOR, UN Doc A/CONF.177/20, 1995 [*Beijing Declaration*].

¹⁰¹ *Ibid.*

¹⁰² See, Scales, *supra* note 59.

¹⁰³ *Brooks*, *supra* note 52.

international treaties and recommendations enacted by international organizations to which Canada and Colombia are party, such as the UN and the International Labour Organization (ILO). These treaties and recommendations will create the international legal framework that will enable a comparison of the domestic legislation in these two countries with different legal systems. The second part of the chapter will consider the existing legislation and jurisprudence enacted in Canada and in Colombia to achieve the goals of equality for women in the workplace. The final part of this chapter will contain reflections and conclusions, determining whether the enacted legal framework in the two countries succeeds, or fails to succeed, in helping women harmonizing their productive and reproductive roles effectively.

1.1 International Standards and Goals Shared by Colombia and Canada with Respect to the Protection of Maternity Rights for Pregnant Women

Procreation benefits society and should be recognized as a responsibility for all its members. However, pregnancy cannot be separated from women as only women are able to become pregnant and, as such, it becomes intrinsic to the experiences and lives of women. The increased number of women joining the workforce has marked and changed the work environment in Colombia and Canada, adding women's experiences and voices to an environment initially created for men. These factors raise issues of disparate treatment and how to use it or avoid it to protect the rights of female workers and achieve equality of women in the workplace.

This chapter will begin by providing background on the rights to maternity protection for women, as examined by feminist scholars and jurists, and will present the international legal framework applicable to both Colombia and Canada, establishing international standards¹⁰⁴ and goals for the two countries. This section examines the feminist theory and international standards together because each has been influenced by the other:

¹⁰⁴ Note that international law on maternity protection are set out both in “hard” international law through treaties, and “soft” international law through non-binding international documents such as ILO's recommendations and UN's Sustainable Goals.

feminist theory has helped to develop the international standards, and international standards have helped to develop the feminist theory.¹⁰⁵

Feminist scholars have provided answers to the ‘women question’ in numerous ways. This is a reflection to the fact that feminist jurisprudence does not follow a unique approach but rather a variety of methods to add women’s perspectives into the science of law. For example, Ann C. Scales,¹⁰⁶ defended the notion that women and men are different by nature and for this reason effective equality can only be achieved if legal systems recognize and celebrate these natural differences when enacting legislation.¹⁰⁷ Indeed, for numerous years, domestic laws and regulations adopted a gender-neutral approach, treating women and men in the same manner in the working world. This approach led to a lack of recognition that only women directly experience pregnancy and childbirth, fostering discriminatory practices that created a negative impact on women’s rights in the workplace. For example, the decision of the Supreme Court of Canada in *Bliss v Attorney General Canada*¹⁰⁸ stripped women of their right to benefits, not because they were women, but because they were pregnant, making a distinction between a pregnant woman and a pregnant employee.¹⁰⁹

Feminist legal scholars have critiqued this “sameness” approach by arguing that the law must consider certain essential differences between men and women’s reproductive roles, including pregnancy and breastfeeding. These differences should not permit discrimination: rather, they should be taken into consideration by the law to positively accommodate the natural characteristics of women.¹¹⁰

However, adopting an approach recognizing these differences is not straightforward. There is debate on how to achieve the positive accommodation outcome. In particular, feminists question whether existing law created to address male-dominated workplaces should be amended to create a list of relevant differences between men and women based

¹⁰⁵ Charlesworth, Chinkin & Wright, *supra* note 62 at 644.

¹⁰⁶ Scales, *supra* note 59.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Bliss v Attorney General of Canada*, [1979] 25 CanLII 1 (1 SCR 183) (1978 CanLII 25 (SCC)) (available on <https://www.canlii.org/en/ca/scc/doc/1978/1978canlii25/1978canlii25.pdf>).

¹⁰⁹ *Ibid.*

¹¹⁰ Scales, *supra* note 59.

on their reproductive roles, or whether a more transformational approach to law is needed.¹¹¹ In words of Ann Scales:

Feminists have tried to describe for the judiciary a theory of “special rights” for women which will fit the discrete non-stereotypical, “real” differences between sexes. And herein lies our mistake: we have let the debate become narrowed by accepting as correct those questions which we seek to arrive at a definitive list of differences. In doing so, we have adopted the vocabulary, as well as the epistemology and political theory of the law as it is.¹¹²

Feminist scholars agree that change in the legal system must include the recognition and celebration of differences between sexes. In their view, the positive recognition of natural differences will necessarily lead legal doctrine to a modernization of employment and labour laws to attract, retain and accommodate female employees: “the law must finally enter the twentieth century”¹¹³ and, indeed, the twenty-first century. Feminist scholars and jurists propose ways the feminization of work¹¹⁴ will bring women’s lived experiences into the legal framework. The feminization of work does so by prompting important legislative changes in the workplace such as: provision of flexible hours of work; allowing for the effective use of emerging technology to minimize the need for women to choose part-time and/or precarious jobs to balance family and work life; updating legislation to eliminate exclusion and segregation of women based on unnecessary and discriminatory job requirements; permitting the addition of child-care and senior-care support for parents within group benefits to attract women into “male-dominated” careers; expanding the definition of harassment to include gender-based bullying in the workplace; and adopting minimum wage standards that take into consideration the realistic economic needs of mothers, parents, and seniors.¹¹⁵

¹¹¹ For more about the sameness and differences discussion see Christine A Littleton, “Reconstructing sexual equality” (1987) 75:4 Cal Rev 1279 at 1304. And Christine A Littleton & Catharine A MacKinnon, “Feminist Jurisprudence: The Difference Method Makes” (1989) 41:3 Stanford Law Rev 751.

¹¹² Scales, *supra* note 59 at 1375.

¹¹³ Scales, *supra* note 59.

¹¹⁴ A concept encompassing three main developments: the entry of women into paid labour force; the segregation of women to certain industries and the tendency of men to perform jobs traditionally done by women. For a more detail analysis of the concept of feminization of work, see Melissa Cooke-Reynolds & Nancy Zukewich, “The Feminization of Work”, (Spring 2004).

¹¹⁵ By reviewing the minimum wage and/or income for families and seniors, the legislation will aid in reducing the heavy economic burden for women who are the main care providers for their families.

To ensure equity for women at work, employers should review and identify employment practices that are discriminatory to women, such as those that use women's reproductive roles and functions¹¹⁶ to permit negative consequences for working women, and to simplify and help women entering or re-entering the labour market after childbirth. "Special maternity protection measures should be taken to enable women to fulfill their maternal role without being marginalized in the labour market".¹¹⁷ "Marginalization could occur when employers decide to employ fewer women, or employ them at lower wages on the basis that they might be less committed and less productive employees than similarly qualified males, because of potential child-care demands."¹¹⁸

The protection of women during and after pregnancy is a basic human right recognized extensively by international treaties and other documents. As active members of the international community through the UN and the ILO, both Canada and Colombia are party to several legally binding international treaties that protect the equality rights of women within the paid and unpaid labour markets.

The ILO has adopted several key treaties on this theme. One of the central goals of the ILO is to "enable women to effectively combine their reproductive and productive roles, and prevent unequal treatment in employment due to their reproductive activity."¹¹⁹ Thus, the ILO produced the first international standards to specifically address maternity. The Maternity Protection Convention 1919 (No.3) has the purpose of addressing concerns such as the protection of the health of the mother and her newborn, the ability of women to combine successfully their reproductive and productive roles, the prevention of unequal treatment at work due to their reproductive role and the promotion of the principle of equality of opportunity and treatment between women and men.¹²⁰ The Convention was revised in 1952 (No.103) to reflect legal developments in social security.¹²¹ The labour environment continued to rapidly change mainly due to the

¹¹⁶ *Beijing Declaration*, *supra* note 90 at 178(b).

¹¹⁷ International Labour Conference (83rd session), *Equality in Employment and Occupation*, III (Part4B) (Geneva, Switzerland: International Labour Office, 1996).

¹¹⁸ Johnstone, *supra* note 74.

¹¹⁹ International Labour Conference (83rd session), *supra* note 107.

¹²⁰ Laura Addati, Naomi Cassirer & Katherine Gilchrist, *Maternity and paternity at work: law and practice across the world* (Geneva: International Labour Office, 2014) at 1.

¹²¹ Addati, Cassirer & Gilchrist, *supra* note 110.

increased participation of women in the workforce and the growing commitment to eliminate discrimination for women in employment. These demographic changes have also altered the needs of women to successfully balance maternity and work. Recognizing this changing labour environment, the ILO created the most recent revision of the convention, the Maternity Protection Convention, 2000 (No. 183), which identifies factors of potential systemic discrimination and creates protective measures, including the prevention of exposure to health and safety hazards during and after pregnancy; entitlement to paid maternity leave, maternal and child health care and breastfeeding breaks; protection against discrimination and dismissal in relation to maternity; and a guaranteed right to return to work after maternity leave.¹²² The Convention also expands the protection of pregnant employees with the purpose of establishing a comprehensive holistic approach that creates a strategy that protects the health of the mother and the child, including women in atypical forms of work; health protection in the workplace; and leave in the event of illness and/or complications.¹²³ Furthermore, the Convention was supplemented by the ILO's non-binding, but influential, Maternity Protection Recommendation 2000 (no.191) to suggest a longer duration of the maternity leave and greater amount of cash benefits.¹²⁴

As a complement to these ILO conventions, it is important to note that CEDAW's article 11(2) covers maternity protection:

In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

- (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave ...
- (b) To introduce maternity leave with pay or with comparable social benefits without the loss of former employment, seniority or social allowances;
- (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities ...;

¹²² *Convention (No. 183) concerning the revision of the Maternity Protection Convention (revised), 1952, 15 June 2000, 2181 UNTS 255 [ILO Convention No.183]* at art 3, 4, 5, 8.at arts 3, 4, 5, 8.

¹²³ Addati, Cassirer & Gilchrist, *supra* note 110.

¹²⁴ *Recommendation (No. 191) concerning the revision of the maternity protection recommendation, 1952, ILO Rec. 88th Sess, [ILO Recommendation No. 191]* at arts 1,2,3.

- (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.¹²⁵

As can be seen from the text of article 11(2), in contrast to the ILO Conventions discussed above, CEDAW does not establish a minimum length of maternity leave. However, CEDAW does indicate that maternity leave must be paid or accompanied by comparable social benefits, and is meant to be read in conjunction with the ILO Conventions when a state has ratified both the ILO Conventions and the CEDAW.¹²⁶

Colombia has ratified only one of these ILO Conventions, the ILO Maternity Protection Convention 1919, No. 03;¹²⁷ It has also ratified the CEDAW. Canada has not ratified the ILO maternity treaties, but has ratified CEDAW. These documents contain the rules of a gender-equal international legal system for Colombia and Canada, as well as a commitment to eliminating gender-based discrimination in employment¹²⁸ applicable to the two countries, recognizing that “maternity is a condition which requires differential treatment to achieve genuine equality”.¹²⁹ The protection of working women during and after pregnancy is essential to achieving the goal of equality and, as such, the governments of both countries are obligated to put into place legislation and programs to ensure the effective protection of the rights of pregnant employees,¹³⁰ women who have recently given birth¹³¹ and new parents.¹³²

In addition, non-binding but influential international norms of gender equality in the workplace have been expressed in the UN’s Sustainable Development Goals.¹³³ The Sustainable Development Goals recognize equality as a necessary foundation for a

¹²⁵ CEDAW, *supra* note 11 at art 11(2).

¹²⁶ Frances Raday, “Article 11” in *U N Conv Elimin Forms Discrim Women - Comment* (New York: Oxford University Press Inc., 2012) at 300.

¹²⁷ *Convention (No.03) concerning the employment of women before and after childbirth, as modified by the Final Articles Revision Convention 1946, 13 June 1921, 38 UNTS 54* (ratified by Colombia, 20 June 1933) [*ILO Maternity Protection Convention No. 03*].

¹²⁸ Mary Cornish & Fay Faraday, *Linking International and Domestic Equality Rights: Using Global Gender Standards to Further Canadian Women’s Economic Equality* (Vancouver, British Columbia, 2005).

¹²⁹ International Labour Conference (83rd session), *supra* note 107.

¹³⁰ *Convention (No. 103) concerning maternity protection (revised 1952), 28 June 1952, 214 UNTS 322* [*ILO Convention No.103*].

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Transforming our World: the 2030 Agenda for Sustainable Development, UNGAOR, 17th Sess, UN Doc. A/Res/70/1, (2015)* [*Transforming our World: the 20/30 Agenda for Sustainable Development*].

peaceful, prosperous and sustainable world.¹³⁴ Additionally, gender equality for women will necessarily include a balance of women's productive and reproductive roles and therefore, the protection of maternity rights is essential to the achievement of Sustainable Development Goal No. 5 of achieving gender equality and empowerment of all women and girls.¹³⁵ The protection of maternity rights also contributes to the achievement of other goals, such as Goal No. 3, that aims to reduce child mortality and improve the health of mothers. Protecting women's maternity rights, provides them with benefits and time off-work necessary to recuperate from childbirth, without penalizing them financially.¹³⁶

To attain Sustainable Goal No. 5, the UN has established targets to be achieved globally such as: ending all forms of discrimination against women and girls everywhere; and recognizing and valuing unpaid care and domestic work through the provision of public services, infrastructure and social protection policies; and the promotion of shared responsibility within the household and the family as nationally appropriate.¹³⁷

Furthermore, adopting and strengthening sound policies and enforceable legislation for the promotion of gender equality (such as maternity leave provisions) and the empowerment of all women and girls at all levels, governments will ensure women's full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life.¹³⁸

The next section of this chapter will review current legislation instated in Colombia and Canada to achieve the above-noted international standards and goals. It will also review cornerstone jurisprudence that has developed and changed the interpretation and legal application of statutes with the purpose of achieving equality for women in the workplace.

¹³⁴ *Ibid* at 20.

¹³⁵ *Ibid* at (5.6), (5.9); *Beijing Declaration*, *supra* note 90 at 12,68,111.

¹³⁶ *Transforming our World: the 20/30 Agenda for Sustainable Development*, *supra* note 122 at 7.

¹³⁷ *Ibid* at goal 5(5.4).

¹³⁸ *Ibid* at 20.

1.2 The Development of Legislation and Jurisprudence of Maternity Rights for Working Women in Colombia

Colombia is party to numerous international agreements, rules and regulations to create the legal framework that protects working women's maternity rights. Of special importance for Colombia are: the International Labour Organization's Maternity Conventions; article 11 of the Convention on the Elimination of all forms of Discrimination Against Women; and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (otherwise known as the "Protocol of San Salvador") that, in its article 6, protects equality rights of women at work by establishing the commitment of State parties to "implement and strengthen programs that help to ensure suitable family care, so that women may enjoy a real opportunity to exercise the right to work."¹³⁹ Domestically, Colombia's Labour Code enacts the protection of working women and underage workers in its chapter V (articles 236 to 246). The following titles of this chapter will visit, explain and analyze the enacted domestic legislation in Colombia aimed at helping women to harmonize their productive and reproductive roles.

1.2.1 Recognition and Value of Unpaid Care and Domestic Work

Maternity and domestic care responsibilities are factors that increase the vulnerability of women who decide to join the paid labour market in Colombia. These have been used by employers to exclude women from enjoying equal treatment and opportunities at work. Domestic care and household responsibilities in Colombia are tied deeply to women's perceived role in society: many women have fulfilled their role by renouncing their careers or jobs to take care of their homes and families, putting them in a position of disadvantage and vulnerability in cases of divorce or death of their husbands.

¹³⁹ OAS, General Assembly, 18th Sess, *Protocolo adicional a la Convención Americana sobre Derechos Humanos en materia de derechos económicos, sociales y culturales*, "Protocolo de San Salvador", OR OEA Doc.A-52 (1998) at art. 6

The International Labour Organization has recognized the economic and social value of domestic work, yet these activities remain poorly regulated by labour legislation.¹⁴⁰ As such, the ILO the Convention concerning decent work for domestic workers 2011 (No. 189),¹⁴¹ as well as recommendation No. 201,¹⁴² stating that domestic workers must enjoy the same labour rights and guarantees as those available to other workers.¹⁴³ Convention 189 was ratified by Colombia on May 9, 2014.

To protect women dedicated to domestic care, the Colombian Constitutional Court, in decision T-494 of 1992,¹⁴⁴ recognized that women's domestic work has been perceived as labour of lesser value than that of men. These perceptions make women's contributions to their family and the household economy almost invisible to the eyes of the community.¹⁴⁵ The Court decided that these perceptions are contrary to articles 13¹⁴⁶ and 43¹⁴⁷ of the Political Constitution, that unpaid work is valuable to the individual household and to the overall economy of the country, and that this contribution should be recognized as such by legislation.¹⁴⁸ However, it was only in 2010, when Law 1413,¹⁴⁹ better known as the "The Economy of Care-work Law",¹⁵⁰ was enacted to recognize and protect the economic value of the unpaid work of women dedicated to domestic work. The law included unpaid and domestic work in the National Accounts System (SCN) with the purpose of tracking

¹⁴⁰ Debbie Budlender, International Labour Office & Conditions of Work and Employment Programme, *Measuring the economic and social value of domestic work: conceptual and methodological framework* (Geneva: ILO, 2011).

¹⁴¹ *Convention (No. 189) concerning decent work for domestic workers, 16 June 2011, PR No. 15A [ILO Convention No. 189]*.

¹⁴² *Recommendation (No. 201) concerning decent work for domestic worker, 16 June 2011, 100th ILC session [ILO Recommendation No. 201]*.

¹⁴³ Budlender, International Labour Office & Conditions of Work and Employment Programme, *supra* note 129 at 82.

¹⁴⁴ T-494-1992, MP *Ciro Angarita Barón*, 1992 Corte Constitucional de Colombia (available on <http://www.corteconstitucional.gov.co/RELATORIA/1992/T-494-92.htm>).

¹⁴⁵ Uprimny et al, *supra* note 33 at 29.

¹⁴⁶ *Constitución de Colombia*, *supra* note 23 ("[a]ll persons are born free and equal before the law" at art 13).

¹⁴⁷ *Ibid.* ("[m]en and women have the same rights and responsibilities. Women will not be discriminated" at art 43).

¹⁴⁸ T-494/92, *supra* note 133 at II.4.

¹⁴⁹ *Ley 1413 de 2010 - Inclusión de la Economía del Cuidado en el Sistema de Cuentas Nacionales*, *Diario Oficial* 47.890, 11 noviembre 2010 [*Ley 1413/10*].

¹⁵⁰ *Ibid.*

and quantifying the economic value of these activities. In December 2013, the SCN¹⁵¹ publish the first report that included unpaid work activities. The report stated that 89.4% of women perform an average of seven hours and 23 minutes of unpaid care and/or domestic work activities per day, compared with a 63.1% of men performing these activities with an average of three hours and ten minutes per day.¹⁵² Furthermore, the bulletin reported that, when added to the household income, the economic value of unpaid care and domestic work increased the income of the Colombian households by 71%.¹⁵³

With the purpose of meeting the United Nations international goal of “recognizing and valuing unpaid care and domestic work through the provision of public services, infrastructure and social protection policies and the promotion of shared responsibility within the household and the family as nationally appropriate”,¹⁵⁴ and based on the recognition of the social and economic value of women’s unpaid work; Colombian jurisprudence established that women who decide to join the paid labour market are considered to have a dual work-shift: one shift on the paid labour market and one on unpaid domestic work and caretaking of homes and families. This jurisprudence indicated that employers should make necessary accommodations as such.¹⁵⁵ This “dual-shift” adds approximately seven hours to women’s work day, for a total of twelve to fourteen work hours per day. Therefore, women who work full-time or part-time taking care of their homes and families are considered by law to have a formal labour activity that contributes to the sustainability of the household. These recognitions provided legal protections for women that work taking care of their homes and families, however it does little to decrease the level of economic dependence on their husbands, whom continue to be viewed as the breadwinners and “heads” of the household.

¹⁵¹ *Cuentas Nacionales Anuales (SCN)* (Departamento Administrativo Nacional de Estadística (DANE), 2010). – DANE elaborates the National Accounting report since 1970, following the directives contained in the United Nations, System of National Accounts 1993 (SNA-93).

¹⁵² *Encuesta Nacional de Uso del Tiempo (ENUT)* (Bogotá, Colombia: Departamento Administrativo Nacional de Estadística (DANE), 2013).

¹⁵³ *Ibid* at 23.

¹⁵⁴ *Transforming our World: the 2030 Agenda for Sustainable Development*, *supra* note 122 at goal No. 5.

¹⁵⁵ *C-410-94*, 1994 Corte Constitucional de Colombia (available on <http://www.corteconstitucional.gov.co/RELATORIA/1994/C-410-94.htm>).

With the increased participation of women in the paid labour market, many of them assumed the role of breadwinners and “heads” of the household, especially in families where the male is absent. Despite their newly-acquired role and responsibilities, legal protections to the family continued based on stereotypical gender roles, leaving women vulnerable. Law 82 of 1993¹⁵⁶ was created to protect and aid women who are considered “head of the household”.¹⁵⁷ It recognizes that female heads of household are in a vulnerable situation and, to correct this, they should have a special legal protection that will aid the effective advancement of women’s reproductive and productive roles in society.¹⁵⁸ This law also recognizes the effective development of economic, social and cultural rights and the need to ensure the enjoyment of a dignified life style for them and for the members of their family, specifically to ensure access to healthcare and wellness services, housing, access to education, access to stable jobs, financial support, and access to social security.¹⁵⁹ The law also protects the rights of children under the care of female heads of household by ensuring that they have guaranteed access to education and school supplies.¹⁶⁰ This law is a good example of the Colombian strategy to achieve equality for women by implementing positive action, based on the acknowledgement of a long history of oppression against women and the inefficiency of the legal system of protecting their rights. However, in families with male spouses, they continue to be viewed as the main breadwinners of the household under law, and, by social and legal implication, female spouses are expected to dedicate themselves to caregiving and domestic work in the family. The Political Constitution of 1991 gives central importance to the protection of the family and children as the nucleus of Colombian society. As such, and recognizing that numerous women and children continue to depend economically on the employment of men, the Constitutional Court, in decision C-005 of 2017, recommended a legislative

¹⁵⁶ *Ley 82 de 1993 - Normas para apoyar de manera especial a la mujer cabeza de familia*, *Diario Oficial* 41.101, 3 noviembre 1993 [Ley 82/93].

¹⁵⁷ *Ibid* at 82. modified by *Ley 1232 de 2008 - Modifica la ley 82 de 1993, ley mujer cabeza de familia*, *Diario Oficial* No. 47.053, 17 July 2008 [Ley 1232/08], p art. 2. (“head of the household” as women (married or single) who are the main caretakers of the household and that have the responsibility for children under the age of eighteen or that have a disability. They should also be the main source of income for the household due to the permanent absence or disability of their spouse. This condition should be formally declared by a public notary).

¹⁵⁸ *Ley 82/93*, *supra* note 145, at art. 3.

¹⁵⁹ *Ibid* at art 3.

¹⁶⁰ *Ibid* at arts. 5,6,7.

change to the maternity protection normative in article 239 of the Labour Code. The decision came as result of a constitutional challenge made by Wadys Tejada Flórez, who considered that the protection was discriminatory to men. The Court extended the special constitutional protections in article 239 of the Labour Code to fathers and spouses of stay-at-home mothers who are pregnant and/or breastfeeding.¹⁶¹

Another important initiative of Colombia to protect caregivers and domestic workers is the recognition and creation of jobs for Community Mothers. Community Mothers are members of the community dedicated to the care of children. These Mothers are hired by the government through the Family Wellness Institute (Instituto Colombiano de Bienestar Familiar (ICBF)),¹⁶² to take care of the children of mothers who join the workforce.¹⁶³ The model includes benefits, vacations, and salary for Community Mothers and it aims to help working mothers find responsible, affordable care for their children in their own neighbourhoods while they undertake paid work, saving them childcare and transportation costs.¹⁶⁴ The success of the Community Mothers program has been somewhat debatable, as many women performing the role have had to fight for the recognition of their employment rights, such as social benefits, vacation and minimum wage.¹⁶⁵ The continuous fight of the Community Mothers for the full recognition of their employment rights is yet another example of the existence of a legal system based on stereotypes and biases about women's roles and obligations, where women's work is not fully recognized at the same level as men's work.

¹⁶¹ C-005-2017, MP Luis Ernesto Vargas Silva, 2017 Corte Constitucional de Colombia (available on <http://www.corteconstitucional.gov.co/relatoria/2017/c-005-17.htm>) at 6.

¹⁶² The Community Mothers' Program started as a social volunteer initiative with *Ley 89 de 1988 - Asignación recursos al Instituto Colombiano de Bienestar Familiar*, *Diario Oficial* 38.635, 29 December 1988 [*Ley 89/1988*] at 89. Their employment was recognized and formalized by *Ley 1607 de 2012 - normas en materia tributaria*, *Diario Oficial* 48.655, 25 December 2012 [*Ley 1607/12*] at 36.

¹⁶³ *Protocolo para la vinculación laboral de las madres comunitarias y su afiliación al Sistema Integral de Seguridad Social* (Ministerio de Trabajo, 2014).

¹⁶⁴ *Ibid.*

¹⁶⁵ In decision T-480-2016, MP Alberto Rojas Ríos, 2016 Corte Constitucional de Colombia (available on <http://www.corteconstitucional.gov.co/relatoria/2016/T-480-16.htm>). The Constitutional Court recently recognized in part the right of 106 Community Mothers to receive, a pension as public employees. It was only recognized for Community Mothers working since 1988. The Court based its decision on the protection to the fundamental rights of human dignity, social security protections and minimum wage and that are part of the Political Constitution.

Colombia has recognized the importance and value of women's unpaid care and domestic work and has tried to quantify and report the value of it. It has also enacted legislation and produced jurisprudence protecting the value of women's work. The legislation is successful in creating a system to identify the importance and need of women's care and domestic work. It would be difficult to establish, and outside the scope of this research, whether the enacted legislation has been successful in producing a measurable and tangible change in the conditions of women work in the unpaid sector. However, it is safe to affirm that recognizing and quantifying the value of women's work is only the first step in creating an effective system where women feel supported in balancing their unique productive and reproductive roles. Discrimination based on parental status and the achievement of pay equity and employment segregation are important factors to this equation and this thesis will refer to these issues in Chapter 3.

1.2.3 Protections for Pregnant Employees and New Parents

Maternity rights for working women in Colombia are contained in articles 43-53 of the Political Constitution, which proclaim that women should not be discriminated against because of their sex and that they have equal rights and obligations as men. Furthermore, the articles establish that the government should give special protection to pregnant women or women who have recently given birth.¹⁶⁶ These rights are further developed at law in chapter V (articles 236-246) of the Labour Code.¹⁶⁷ Articles 236 to 238 speak about the maternity and parental leaves and this research will refer to the maternity leave aspect later in this chapter. The most important protection for pregnant and breastfeeding employees rests in article 239 of the Colombian Labour Code, which creates a constitutionally-reinforced job stability, that is, the prohibition against terminating the employment of a pregnant employee or a new mother (extending the protection for three months after childbirth) due to her pregnancy or breastfeeding conditions.¹⁶⁸ The original text of the article established the obligation of paying indemnities to the terminated

¹⁶⁶ *Constitución Colombia*, *supra* note 23, art. 43.

¹⁶⁷ *Código Sustantivo del Trabajo y Código Procesal del Trabajo y de la Seguridad Social*, 5 August 1950 [Código de Trabajo] at cV arts. 236-249.

¹⁶⁸ *Ibid* at 239.

employee. However, it did not create the obligation to reinstate an employee terminated due to her pregnancy or breastfeeding. This article was the subject of a constitutional challenge before the Constitutional Court.

The Court decided in sentence C-470 of 1997¹⁶⁹ that pregnant working women are in a position of vulnerability to discrimination and, as such, their employment is protected by a constitutional-reinforced job stability mandate. The special protection prohibits the termination of the employment contract without permission from the Labour Inspector or the Mayor in municipalities that do not have a Labour Inspector.¹⁷⁰ It also considers the termination as non-existent before the law, and therefore the employee should be reinstated and receive the indemnities as established in article 239 of the Labour Code.¹⁷¹ This protection is also present in article 239 of the Labour Code and was enacted with the purpose of protecting the mother's employment and income as well as her effective recuperation after childbirth and her right to breastfeeding. As stated previously, since 2017 this protection extends to fathers and spouses of pregnant and/or breastfeeding stay-at-home mothers.

In addition to this constitutionally-mandated job stability protection, the Court also established in decision C-470 of 1997 that the employee does not need to disclose her pregnancy to the employer for this protection to take effect. On the contrary, the Court assumes the employer's knowledge about the pregnancy at the time of the decision of termination. For the Court, pregnancy is a visible condition difficult to conceal and as such it should be legally recognised that the employer had knowledge of the condition.¹⁷²

A recent decision of the Constitutional Court extended the maternity reinforced job stability principle to the spouse of a pregnant woman, when the pregnant woman is dedicated to unpaid domestic and caretaking activities.¹⁷³ With this recent decision, the Constitutional Court aimed to protect the rights of the mother and the newborn child as well as the economic wellbeing of the household. It is unclear as how this decision will

¹⁶⁹ C-470-1997, MP Alejandro Martínez Caballero, 1997 Corte Constitucional de Colombia (available on <http://www.corteconstitucional.gov.co/RELATORIA/1997/C-470-97.htm>).

¹⁷⁰ As established in article 241 of the Labour Code (modified by Decree 13/67)

¹⁷¹ *Código de Trabajo*, *supra* note 156, art. 239.

¹⁷² C-470/97, *supra* note 158 at 10.

¹⁷³ C-005-2017, MP Luis Ernesto Vargas Silva, *supra* note 150.

be regulated in law and how it will be applied to men, as fathers' experience fatherhood in different ways than women. This decision might change legislation created to protect vulnerable pregnant employees to benefit working men more than women, because fathers do not experience the natural changes that a pregnancy causes in the body and wellbeing of a woman. For example, a man whose spouse is pregnant and a pregnant woman working in the same environment will have the same rights and protections; however, the woman must endure the biological changes natural to a pregnancy while the male employee will not. This factor alone will put the female employee in clear disadvantage in terms of productivity, performance and hours of work and it has the potential to increase furthermore the gender income gap. However, the provision aims to protect the income, health and wellbeing of women and in the unpaid labour sector and their families. As such, it is aligned with United Nations' goal of recognizing and valuing unpaid care and domestic work.¹⁷⁴ This decision has generated a heated discussion at different levels, as employers and business owners consider that extending the maternity reinforced job stability principle to the fathers of pregnant women will increase the expenditure burden on their business, potentially forcing them to employ fewer employees.¹⁷⁵

It is also important to note that article 242 of the Labour Code enumerates jobs that are prohibited for women and children.¹⁷⁶ Numeral one of this article was declared unconstitutional by the Constitutional Court in sentence C-622 of 1997. The paragraph prohibited women from working night hours. This prohibition is also contained in the ILO Convention Concerning Employment of Women during the Night 1919 (No.4), ratified by Colombia in June 20, 1933, and currently in force. The Constitutional Court considered that this prohibition created a barrier for women to access employment and that it was openly against the constitutional precept contained in article 43 of the Political Constitution. However, numerals two and three of article 242 are still in force. Numeral two prohibits women and children from working in industrial painting jobs that use of ceruse or lead sulphate and numeral three prohibits women and children from

¹⁷⁴ *Transforming our World: the 2030 Agenda for Sustainable Development*, *supra* note 122 at goal 5.4.

¹⁷⁵ C-005-2017, MP Luis Ernesto Vargas Silva, *supra* note 150 at 1.2.

¹⁷⁶ Under 18 years of age.

employment in underground mines and, in general, from any dangerous jobs that require the use of great amounts of effort. Even though these prohibitions are aimed at protecting the life and health of women¹⁷⁷ and children, the article does not explain the meaning of “jobs that require great effort”, fostering disparate treatment of female employees regarding male employees based only on gender. It could be interpreted to keep women out of jobs historically occupied by men, such as those in the armed forces, and many others that might require the use of physical strength and effort, limiting access to employment, increasing employment segregation and the wage gap. Also, and using the same equity argument used by the Court for extending the constitutional job protections rights to men, one might also argue that employers should also be protecting the health of men whose wives are pregnant, extending the prohibition to fathers of stay-at-home mothers who are pregnant.

Even though Colombia has created legislative tools to protect the rights of women at work, the special protection and disparate¹⁷⁸ treatment to achieve equality is sometimes viewed as a nuisance or a threat by many employers, who prefer not to hire female employees in their childbearing years to avoid the duties of accommodation if the employees become pregnant. It seems that the special protections established by law create barriers for women to access employment and may benefit men more than women. To avoid these unwanted effects of legislation, it is important to create tangible incentives for employers that hire women, such a tax benefits. Law 1429 of 2010 created tax benefits for employers that hire members of vulnerable groups.¹⁷⁹ It creates tax incentives for two years to employers that hire male or female employees who are less than 28 years of age, it also extends the benefits to employers that hire men or women identified as heads of families, and to employers that hire women who are more than 40 years old and have been unemployed for a period of twelve months.¹⁸⁰ These benefits are created to

¹⁷⁷ Women have the potential to become pregnant and exposure to these substances or the use of excessive physical effort might be harmful for the health of the mother and/or her child.

¹⁷⁸ The Constitutional Court has established that temporary disparate treatment is necessary to level the legal ground for protected groups that have suffered historically of oppression to effectively achieve equality. See, *C-410-94*, *supra* note 144.

¹⁷⁹ *Ley 1429 de 2010 - Formalización y Generación de Empleo*, *Diario Oficial* 47.937, 29 diciembre 2010 [*Ley 1429/2010*] at III (1).

¹⁸⁰ Usually the father is considered the head of the family, however single mothers in Colombia have legal special status and protection. See, *Ley 82/93*, *supra* note 145.

encourage employers to hire members of vulnerable groups, however it does not include pregnant women or new mothers – groups that should be considered vulnerable and in need of protection. On the contrary, it seems to purposely exclude them by extending benefits to the head of the family, a paternalistic term that puts men in a power position over women in the family environment. By using this paternalistic terminology, this legislation benefits mainly men and it would only benefit single mothers who become vulnerable not because of the lack of access to employment but because of the lack of a husband.

1.2.4 Maternity Leave in Colombia

Colombia has been active in ratifying international agreements and developing domestic legislation to protect women's rights, including the rights of working mothers. Maternity leave in Colombia is protected by article 53 of the Political Constitution.¹⁸¹ This article establishes two important legal obligations with regard to the protection of working women's rights: first, the obligation of the government, through labour legislation, of providing special protection to employees who are women, pregnant and children; and second, the article establishes that international labour conventions are automatically a part of the domestic legal system.¹⁸² This includes ILO Maternity Convention No. 103, which was ratified by Colombia.

The Colombian Labour Code regulates maternity leave in article 236, which was modified by Law 1468 of 2011. Article 236 establishes that pregnant employees are entitled to fourteen weeks of paid maternity leave at the same salary rate they were earning before going on leave.¹⁸³ Recently, the Senate voted in favour of law 1822 of 2017¹⁸⁴ that modified article 236, extending the maternity leave period from fourteen weeks to eighteen weeks as established in ILO Recommendation No. 191. This is a step

¹⁸¹ *Constitución de Colombia*, *supra* note 23, at art. 53.

¹⁸² This due to the Constitutional Bloc principle that human rights international agreements ratified by Colombia are considered part of the Political Constitution and part of the domestic legal system

¹⁸³ 14 to 17 weeks of maternity leave achieves standards established by the International Labour Organization Convention No. 3, 103 and 183.

¹⁸⁴ *Ley 1822 de 2017 - Adecuada Atención y Cuidados de la Primera Infancia*, *Diario Oficial* 50.106, 4 January 2017 [*Ley 1822/17*] at 182.

in the right direction of supporting women to balance their productive and reproductive roles. It is important to note that the eighteen weeks include pre-partum and post-partum and that there is no parental leave afterwards. As will be seen below, the lack of parental leave puts Colombia at a disadvantage to Canada, which does have parental leave. This reduces the time that mothers spend with their infant children and forces them to seek child care arrangements, in case they need or decide to continue working after their 18 weeks of maternity leave expire.

To start the leave, the employee must submit medical documentation indicating the due date and a date for her to start her leave.¹⁸⁵ These rights are extended to adoptive mothers, and to adoptive fathers without a partner or spouse.¹⁸⁶ The maternity leave may be taken by the father if the mother dies during the maternity leave period.¹⁸⁷ However, fathers are only permitted eighty days of paternity leave.¹⁸⁸ Pregnant women have the option of taking pre-partum leave starting two weeks before childbirth¹⁸⁹ and a post-partum leave of twelve weeks.¹⁹⁰ The article also extends two to four weeks of leave to women who experience unsuccessful pregnancies such as stillbirth.¹⁹¹ During the maternity leave period, the salary of the employee on leave is covered by the Social Security Institute and the Health Promotion Companies as per employment regulations.¹⁹²

Since mothers often return to work during their breastfeeding period, under article 238 of the Labour Code employers have the obligation of providing two daily paid breastfeeding breaks of thirty minutes each for a period of six months after the birth of the child.¹⁹³ To facilitate this process, employers must provide an adequate and comfortable space at work for mothers to breastfeed. However, there is no obligation for employers to provide child care on the premises.

¹⁸⁵ *Código de Trabajo*, *supra* note 156.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ *Código de Trabajo*, *supra* note 156 at art. 236 s (7a).

¹⁹⁰ *Ibid* at art.236 s(7b).

¹⁹¹ *Código de Trabajo*, *supra* note 156.

¹⁹² *Ibid.*

¹⁹³ This article was created to develop the protection established by ILO's Convention No.3.

Even though the enacted legislation meets the goals established by the ILO, more can be done at the program development level to help Colombian women balance their important roles in the private and in the public spheres, such as mandating longer maternity or parental leaves, providing accessible child care at or near the workplace and supporting breastfeeding working mothers.

1.3 The Development of Legislation and Jurisprudence of Maternity Rights for Working Women in Canada

The increased participation of women in the paid work environment in Canada has fostered changes in legislation to help them harmonize their family and work responsibilities. The following subsections will present the legal framework enacted in Canada to support and protect working women.

1.3.1 Recognition and Value of Unpaid Care and Domestic Work

The section above on Colombia began with a discussion of how Colombia recognizes unpaid domestic work. Unlike Colombia, Canada has not ratified the 2011 ILO Convention concerning decent work for domestic workers (No. 189), and does not provide any direct economic recognition of the unpaid caregiving work that women perform for their families. Even though domestic work in Canada remains unrecognized as a ‘productive’ economic labour activity and is therefore unpaid, Canadian legislation does indirectly attempt to protect the wellbeing of women dedicated to the unpaid care and domestic work. This is mainly done through benefits such as the child and family tax benefits and others established by the Employment Insurance Act and regulations. Said benefits include the Canada Child Benefit, the Goods and Services Tax/Harmonized Sales Tax (GST/HST) credit and their related provincial and territorial programs as well as income-splitting tax benefit and other federal programs. These programs are not directly created with the purpose of recognizing the economic value of the domestic work that women perform for their families, however they do help indirectly, by providing

economic relief to the families of stay-at-home mothers and other unpaid women taking care of their homes and families.

The lack of economic recognition for unpaid work in Canada means that many Canadian women decide to join the paid work force through precarious and part-time work in order to balance personal finances. These jobs are often ill-remunerated, limiting the options that mothers have when hiring paid workers to complete the domestic and care duties that they are not able to do. Kate McInturff explains that economists and important financial institutions have been exalting the role of women's work in the economy. For example, women returned to work more quickly than men after the global financial crisis in 2008.¹⁹⁴ This fact seems positive from the financial analyst's point of view; however, the reasons behind the rapid return to work of women is far from the equality ideal for working women. "According to the World Bank, women are good to the economy because they are segregated into-service and care related occupations, because they are twice as likely to work for minimum wage, because they are three times as likely to work part-time and because they are willing and expected to take up ever-increasing hours of unpaid care work".¹⁹⁵ In their search for economic stability, many women are joining the workforce in less-than-secure jobs. This fact, when added to the increasing costs of child care and the lack of benefits to fulfill the economic needs, creates a gap between what the economy gives to women in exchange of what women are giving to the economy.¹⁹⁶

Women's role in Canadian society has historically been to maintain and protect their homes, to procreate and educate the children, and to take care of their husbands, parents, etc. It was not until World War I that Canadian women began to join the paid workforce in large numbers to support their families, at a time when many men were called to leave their families to undertake military duties. After World War I, women returned to their homes to take care of their families and legislation was enacted to protect the jobs of the

¹⁹⁴ Kate McInturff, "Women's work: what's it worth to you?" (2016) January/February Can Cent Policy Altern, online: <<https://www.policyalternatives.ca/publications/monitor/women%E2%80%99s-work-what%E2%80%99s-it-worth-you>>.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

male employees.¹⁹⁷ For example, Canadian women working in the federal public service had to quit their jobs after marriage and “the regulations of 1918 Civil Service Act permitted the federal government (as an employer) to hire married women only in crisis periods or when no other qualified persons could be found to do the work.”¹⁹⁸ As a consequence, the number of married women working in the public sector service was so small that there was no need for maternity protection laws and regulations.¹⁹⁹ In 1955, a modification to this hiring policy allowed more women to join the public service, introducing a new work culture in which maternity protection laws were needed and implemented.²⁰⁰

This trend initiated a change in the established order of Canadian society and it created a positive environment for the discussion of women’s rights as employees. Today, more women are joining the paid workforce: “In 2009, 58.3% of women, representing 8.1 million women, were employed. This is more than double the number of women employed in 1976”.²⁰¹ In 2011, Statistics Canada reported the existence of 9.8 million mothers in Canada, 4.1 million mothers in Canada with children under 18 living with them, and 70% of working mothers with children under five years of age.²⁰² The rapid increase of women joining the workforce, combined with the recognition of new family structures, different from the classic married male-female based models, are gradually changing the role of caregivers for the children and elders from women only to all members of the family. Despite the changes in society, negative attitudes about caregiving and caregivers remain rooted in the Canadian society. These negative attitudes are often fueled by negative gender stereotypes that affect women in the workplace environment. For example, researchers have found that many employers have the perception that some of the necessary skills for being a good mother are considered to be

¹⁹⁷ Robert Max Jackson, *Down for so Long... The Puzzling Persistence of Gender Inequality*, Course pack, (Department of Sociology, New York University, 2016) at 54.

¹⁹⁸ Laurie Schwartz, *Parental and maternity leave policies in Canada and Sweden* Industrial Relations Centre, Queen’s University at Kingston, 1988) [unpublished].at 23.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ Vincent Ferrao, “Women in Canada: A Gender-Based Statistical Report”, *Statistics Canada Catalogue* (July 2011) 111.

²⁰² Statistics Canada, *The Daily, By the Numbers*, (April 30, 2015), online: <http://www.statcan.gc.ca/eng/dai/smr08/2015/smr08_199_2015#a1>.

contrary to those needed to be the “ideal worker”.²⁰³ These, sometimes unconscious, biases will have a negative impact when hiring or promoting a mother.

Overall, domestic work and care taking activities provide a tangible social worth and as such should be valued and recognized as a productive labour activity. Furthermore, the recognition of the economic value of domestic work would benefit Canada’s economy in numerous ways; for example, by lowering the unemployment rate, and preventing poverty, amongst other benefits.²⁰⁴

1.3.2 Protection of Pregnant Employees and New Parents in Canada

The Supreme Court of Canada has recognized that pregnancy is deeply related to sex as only women can become pregnant and they should not be disadvantaged, or receive adverse differential treatment, based on this biological reality. In *Brooks v. Canada Safeway Ltd.*, the Court provided considerations to two main legal issues: firstly, whether discrimination on the basis of pregnancy is discrimination on the basis of sex; and secondly, whether Safeway’s group insurance plan was discriminatory by excluding pregnant employees.²⁰⁵ The Court found that Safeway’s group insurance policy violated the provincial Human Rights Act by failing to provide equal compensation for those who missed work due to pregnancy:²⁰⁶

in distinguishing pregnancy from all other health-related reasons for not working, the plan imposed unfair disadvantages on pregnant women. Everyone in society benefits from procreation but one of its major costs is placed, under this plan, on one group in society – pregnant women.²⁰⁷

Overall, Safeway’s plan was discriminatory because it imposed unfair disadvantages on pregnant women. Safeway’s defence argued that the plan was not created with the intent

²⁰³ Kathleen Fuegen, “Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence”, (2006) 60 *Journal of Social Issues* 740.

²⁰⁴ Budlender, International Labour Office & Conditions of Work and Employment Programme, *supra* note 129 at 41.

²⁰⁵ *Brooks*, *supra* note 52 at 1233,1234.

²⁰⁶ *Brooks*, *supra* note 52. (Safeway’s Group Insurance Plan, covered employees for wages lost due to absence from work caused by accident of sickness, Pregnancy was exempted from coverage under the plan during the period commencing on the 10th week prior the expected week of confinement and ending the 6th week of confinement. (10-1-6) at 1224)

²⁰⁷ *Ibid* at 1220.

to discriminate, but rather to qualify different levels of risks in its insurance plan.²⁰⁸ The Court explained that intent to discriminate is not an element of discrimination, and that the plan was discriminatory because it created differential treatment causing negative effects and disadvantages to employees based on their sex.²⁰⁹

The decision in *Brooks* overturned the controversial case of *Bliss*, which decided that discrimination based on pregnancy was not sex discrimination;²¹⁰ it also created precedent for future decisions in cases of discrimination against pregnant women in the workplace environment. Indeed, the Court explained that, it is impossible to separate pregnancy from gender, and that issues affecting pregnant employees would affect women, as only women are able to become pregnant: “pregnancy cannot be separated from gender. Discrimination based on pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant.”²¹¹

Despite the fact that only women are able to become pregnant, it is also true that not all female employees will do so - however, discrimination does not have to impact all members of an identifiable group for its configuration. With this in mind, the Court established that, while pregnancy-based discrimination only affects part of an identifiable group, this does not create a reason for exclusion of that group.²¹² “The fact, therefore, that the plan did not discriminate against all women, but only against pregnant women, did not make the impugned distinction any less discriminating.”²¹³ The Court also noted, that even though pregnancy should not be considered to be or treated as an illness, it needs to be recognized as a valid reason for women to require access to health benefits and resources due to the importance the fact that procreation benefits society:²¹⁴

a refusal to find the Safeway plan discriminatory would undermine one of the purposes of anti-discrimination legislation. It would do so by sanctioning one of the

²⁰⁸ *Ibid* at 1239.

²⁰⁹ *Brooks*, *supra* note 52 at par 3.; see also *Ont Human Rights Comm v Simpsons-Sears*, [1985] 2 SCR 536 (C) (available on <http://canlii.ca/t/1ftxz>).

²¹⁰ *Bliss*, *supra* note 98. (In this case the Court reached the conclusion that discrimination based on pregnancy was not discrimination based on sex because “[a]ny inequality between sexes in this area is not created by legislation but by nature” at 192).

²¹¹ *Brooks*, *supra* note 52 at 1242.

²¹² *Brooks*, *supra* note 52.

²¹³ *Ibid* at 1221.

²¹⁴ *Ibid* at 1237.

most significant ways in which women have been disadvantaged in our society. It would sanction imposing a disproportionate amount of the costs of pregnancy upon women. Removal of such unfair impositions upon women and other groups in society is a key purpose of anti-discrimination legislation.²¹⁵

With this statement the Court recognizes that women, are often assuming a disproportionate burden for their reproductive role, creating an added barrier to employment that should be removed to effectively eliminate discrimination against working women.

Despite the Supreme Court of Canada and the government's recognition that childbearing benefits society, and that women who are, or wish to become, pregnant should not feel disadvantaged or discriminated due to this life factor, this view has not always been adopted by employers. Some Canadian employers feel that they are 'forced' to keep positions available and to hire temporary workers to support new parents on maternity, and/or parental leave.²¹⁶ Some employers in Canada also take the view that they are being 'forced' to support the 'nuisances' of employees when they return to work (flexibility of hours, sick days, limited travel availability, etc.).²¹⁷ Based on these negative perceptions, in an anonymous survey conducted in Alberta, employers predicted heightened workplace tensions and potential discrimination against young job seekers. It was feared that women in their childbearing years would be at a disadvantage when it comes to new positions: as was stated by one employer, "[w]e have learned to avoid hiring people we feel will be having families".²¹⁸

As explained by Professor Michael Lynk, the definition of discrimination on the grounds of gender (sex) is broad and includes different events in the life of female employees: "'sex' encompasses discrimination based on pregnancy or childbirth. It also includes pregnancy-related events such as miscarriage, a still-birth, an abortion and other pregnancy complications, as well as active plans to become pregnant and plans to take a maternity leave".²¹⁹ Employers need to ensure that appropriate accommodation is

²¹⁵ *Ibid* at 1238.

²¹⁶ Jasmine Budak, "The Dark Side of Maternity Leave", *Can Bus* (8 September 2011), online: <<http://www.canadianbusiness.com/business-strategy/the-dark-side-of-maternity-leave/>>.

²¹⁷ *Ibid*.

²¹⁸ *Ibid*.

²¹⁹ Michael Lynk, *Employment Law in Canada*, (Faculty of Law, Western University, 2015) at 5.22.

implemented to ensure equal access of women to benefits, and favourable work conditions for their health, family and professional development.

The Supreme Court has also condemned employers that fail to provide necessary workplace accommodations to remove barriers for employment to pregnant employees, such as not adequately investigating an accommodation that would allow a pregnant employee to regularly sit,²²⁰ or refusing to hire a pregnant applicant for a limited term position.²²¹ In *Sauders v. Kentville (Town) Police Service*,²²² a police services board was found to have violated human rights legislation by failing to create a modified job for a pregnant police officer.²²³

Overall the Supreme Court has recognized the need to protect the maternity rights of working women. It has also acknowledged the history of disparate treatment from a male-created work environment, that imposes an extra burden of women's childbearing role.

The next part of this chapter will present how legislation in Canada has been implemented to help women harmonize their productive and reproductive roles, and to remove the employment barriers for pregnant employees.

1.3.3 Maternity Leave in Canada

In Canada, the concept of maternity leave was introduced in 1921 when British Columbia developed the Maternity Protection Act, which prohibited employers from employing women in the six weeks after they gave birth.²²⁴ Federal legislation did not include maternity leave benefits until 1971, when the federal government amended the Canada Labour Code and introduced fifteen weeks of paid maternity leave at 66% of a mother's

²²⁰ *McIntosh v. Shami*, [2006] B.C.H.R.T.D. No.527, 2006 BCHRT 527.

²²¹ *United Nurses of Alberta, Local 115 v. Calgary Health Authority*, [2004] A.J. No.8, 21 Alta. L.R. (4th) 1 (C.A.)

²²² *Sauders v. Kentville (Town) Police Service*, [2004] N.S.H.R.B.I.D. No. 9, C.H.R.R. Doc. 04-318 (N.S. B.d. of Inquiry) see also: *Lord v. Haldimand-Norfolk Police Services Board* (1995), 23 C.H.R.R D/500 (Ont. B.d of Inquiry).

²²³ *Lynk*, *supra* note 208 at 5.

²²⁴ Susan Altschul & Christine Carroa, "Chronology of Some Legal Landmarks in the History of Canadian Women" (1975) McGill LJ 481.

previous salary through the unemployment insurance program.²²⁵ Today, maternity legislation is contained in the Labour Code for federally-regulated employees and at the provincial level for provincially-regulated employees. Overall, federal and provincial laws are similar in terms of the length of the maternity leave. For example, Canada's labour laws provide for 17-weeks of maternity leave for federally regulated employees; for provincially-regulated employees, even though employment legislation varies from one province to another, most provinces confer 17-weeks of maternity leave, with the exception of Alberta, that protects 15-weeks; Saskatchewan, conferring 18-weeks; and Quebec, where, since January 1, 2006, maternity, paternity, parental and adoption benefits are provided through a program called Quebec Parental Insurance Program.²²⁶ As part of the program, parents choosing to participate will increase the benefit amount but decrease the period of the claim. As such, a maternity leave totals 18 weeks under the basic plan and 15 weeks under the special plan.²²⁷ Paternity leave totals five weeks under the basic and three weeks under the special plan.²²⁸ Parental leave totals 32 weeks under the basic plan and 25 weeks under special plan and adoption leave totals 37 weeks under the basic and 28 weeks under the special plan.²²⁹ The following table will further present provincial regulations enacted to protect maternity and parental leaves.

Table 1: Comparison of Provincial Legislation on Maternity, Parental and Adoption Leaves in Canada

Province	Maternity Leave Weeks	Parental Leave Weeks	Adoption Leave Weeks
Federal <i>Canada Labour Code, RSC 1985, c L-2 s 206 (1)</i>	17 After six months of employment	37 or 35 After six months of employment	37
Alberta	15	37 or 35	37

²²⁵ Kathryn Meehan, "Falling Through the Cracks: The Law Governing Pregnancy and Parental Leave", (2004) 35:2 Ottawa Law Review 2011 at 2016.

²²⁶ An Act Respecting Parental Insurance, CQLR c A-29.011, <http://canlii.ca/t/52kzl>.

²²⁷ *Ibid*, at s 7.

²²⁸ *An Act Respecting Parental Insurance*, *supra* note 215.

²²⁹ *An Act Respecting Parental Insurance*, *supra* note 215 at s 18.

<i>Employment Standards Code, RSA 2000, c E-9 s 45, 46 (1)(2), 50 (1)(2)</i>	After 52 weeks of employment	After 52 weeks of employment	
British Columbia <i>Employment Standards Act, RSBC 1996, c 113 s 50, 51</i>	17	37 or 35	37
Manitoba <i>The Employment Standards Code, CCSM c E110, s 54 (1) 58 (1)</i>	17 after seven months of employment	37 or 35 after seven months of employment	37
New Brunswick <i>Employment Standards Act, SNB 1982, c E-7.2 s 43 (1)</i>	17	37 or 35	37
Newfoundland and Labrador <i>Labour Standards Act, RSNL 1990, c L-2, s 40, 43(1), 43(3)</i>	17 After 20 weeks of employment	35 After 20 weeks of employment	52 After 20 weeks of employment
Northwest Territories <i>Employment Standards Act, SNWT 2007, c 13 s 26, 27, 28</i>	17 After 12 months of employment	37 or 35 After 12 months of employment	35
Nova Scotia <i>Labour Standards Code, RSNS 1989, c 246 s 59, 59(b)</i>	17 After one year of employment	52 or 35 After one year of employment	52
Nunavut <i>Labour Standards Act, RSNWT (Nu) 1988, c L-1 30, 31(2), 34(6)</i>	17 After 12 months of employment	37 or 35	37

		After 12 months of employment	
Ontario <i>Employment Standards Act, 2000, SO 2000, c 41 s 46, 48</i>	17 After 13 weeks of employment	37 or 35 After 13 weeks of employment	37
Prince Edward Island <i>Employment Standards Act, RSPEI 1988, c E-6.2</i>	17 After 20 weeks of employment	35 After 20 weeks of employment	52 After 20 weeks of employment
Quebec <i>An Act Respecting Labour Standards, CQLR c N-1.1 s 81</i>	18 or 15 / 5 or 3	32 or 25	37 or 28
Saskatchewan <i>The Saskatchewan Employment Act, SS 2013, c S-15.1 s 2-49, 2-50, 2-51</i>	18 After 13 weeks of employment	37 or 34 After 13 weeks of employment	Same as Maternity
Yukon <i>Employment Standards Act, RSY 2002, c 72 s 36 (1) 38 (1) s 20, 22</i>	17 After 12 months of employment	37 After 12 months	37

All provinces in Canada have recognized the need for protected maternity, parental and pregnancy rights. As explained in Table No. 1, most provinces (except for Quebec) have adopted similar periods for paid maternity, parental and adoption leave. The ability of parents to enjoy this period with their growing families will greatly depend on the economic stability of the family. During maternity and parental leaves, most provinces will allow new parents to receive benefits that will cover at least some lost wages during their time off work after completing an eligibility period that varies with each province.

This statutory income replacement insurance plan is governed by the Employment Insurance Act (EIA).²³⁰

In Canada, there are two type of benefits offered to parents; the maternity (pregnancy) benefits are offered to biological mothers (including surrogate mothers) who are unable to work due to pregnancy or that have recently given birth;²³¹ and parental and adoption benefits are offered to parents who are caring for a newborn or a newly adopted child. Mothers in Canada are able to combine their maternity and parental leave periods, or to share it with their spouse. Overall the amount of time that parents are able to enjoy parental benefits depends on their financial stability. Indeed, some parents will be eligible for EIA income replacement program created to provide income support for parents looking after their newborn or adopted children, provided that they work in the formal sector and comply with the length of employments established by the law. The EIA income replacement program is funded by employer and employee premiums. Benefits received under EIA are considered taxable income for parents and, as such, federal and provincial taxes will be deducted.²³² The benefits provided by EIA, will cover the income of mothers working in insurable employment, however it does not provide benefits for women working in the informal sector. Indeed, “In 2015, only 75.7% of recent mothers had insurable employment. Among these insured mothers, 87.2% received maternity or parental benefits.”²³³ These statistics go to show, that legislation does not provide protection to pregnant women working in the informal sector of the economy. Furthermore, in some instances, the income replacement benefits offered by the government are less than the total compensation received by women when actively at work. To increase women’s participation in employment, some employers offer, as part of their private work group benefits, an insurance (“top-up”) amount for new parents, to decrease loss of income during the maternity, pregnancy and/or the parent leave period. Similarly, low-income²³⁴ families with children who receive the Canada Child Tax

²³⁰ *Employment Insurance Act, SC 1996, c 23* [*Employment Insurance Act, SC 1996, c 23*].

²³¹ *Ibid* at 54(Y)(ii).

²³² *Employment Insurance Act, SC 1996, c 23, supra* note 219.

²³³ Statistics Canada Government of Canada, “Coverage and eligibility of the unemployed for Employment Insurance benefits, Canada, 2015”, (16 November 2016), online: <<http://www.statcan.gc.ca/daily-quotidien/161116/t001b-eng.htm>>.

²³⁴ Net family income up to \$25,921 yearly maximum.

Benefit can also receive the EI Family Supplement. The EI Family Supplement may increase the payable benefits to as much as 80% of average insurable earnings of the parent.²³⁵

Overall, labour and provincial legislation in Canada, have been successful in protecting the rights of pregnant working women. However, despite the legislative efforts many women, working in the informal sector, will not be eligible to enjoy maternity leave benefits. To achieve equality for all working women, legislation should consider extending labour and employment protections to women working in unpaid, domestic and self-employment.

The next part of this chapter will provide final remarks with regards to the legislation and jurisprudence implemented in Canada and Colombia, to achieve the maternity standards established by shared international agreements, such as CEDAW.

1.4 Final Remarks

Colombia and Canada are both State parties to treaties adopted under the auspices of the ILO and UN that contain clear obligations relating to maternity protections for employed mothers and mothers-to-be. In particular, Colombia has ratified ILO Maternity Protection Convention 1919, No. 03, which automatically become part of Colombian domestic law. Canada has not ratified the ILO maternity leave conventions, but, like Colombia, it has ratified the CEDAW. This Convention recognizes the importance of women's reproductive role and the obligation of State parties to eliminate any form of discrimination based on pregnancy.

[b]earing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole.²³⁶

²³⁵ *Employment Insurance Act, SC 1996, c 23, supra note 219 at s 16 (1).*

²³⁶ *Convention on the Elimination of all Forms of Discrimination against Women, 18 December 1979, GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980) [CEDAW] at 15.*

As such article 11 of CEDAW in its numeral 2, contains important obligations for State parties to protect the right of maternity leave of working women:

2. [i]n order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.²³⁷

Given these obligations, both countries are expected to modify their domestic legal systems with the purpose of establishing and implementing inclusive legislative and policy frameworks for comprehensive maternity and work-family policies, with adequate fiscal space.²³⁸ Has this been accomplished? The next subsection will consider Canada and Colombia's advances in this respect.

1.4.1 Maternity Leave in Colombia and Canada

Colombia and Canada have adopted and implemented legislation to protect the rights of working women in the workplace. Initially some of these legislative efforts attempted to adopt gender-neutral laws and policies, ignoring the natural differences between sexes.²³⁹ Feminist jurists have long discussed how equality for women should be implemented and some take the position that women should be treated in the same terms and under the same conditions as men. However, this position ignores the fact that women and men are different by nature and that policies that are gender-neutral could

²³⁷ *Ibid* at art 11(2).

²³⁸ Addati, Cassirer & Gilchrist, *supra* note 110 at 13.

²³⁹ Wendy W Williams, "Equality's riddle: Pregnancy and the equal treatment/special treatment debate" (1984) 13 NYU Rev Soc Change 325 at 326,327. And Scales, *supra* note 59.

favor men and cause discrimination against women.²⁴⁰ One of these natural differences between men and women is the experience of pregnancy. Only women can become pregnant and this unique characteristic could make them vulnerable to discrimination; especially within a male-created environment, such as the workplace.²⁴¹ Feminist jurists such as Wendy Williams and Ann Scales argue that, to achieve effective equality, there is a need to review the legal system and enact legislation that is not gender-blind, but rather considers and celebrates the differences amongst sexes.²⁴²

In the development of a legal system that effectively protects the rights of pregnant working women, Canada and Colombia have now recognized, mostly through litigation,²⁴³ the inequalities that a gender-neutral approach produces for pregnant employees. Thus, both countries have created regulations that protect the unique needs of women during and after pregnancy; such as maternity leaves and breastfeeding regulations. Maternity leave policies are crucial to support women who join the paid work environment. As such, both Canada and Colombia have enacted maternity leave legislation to achieve the requirements established in the CEDAW and, for Colombia, International Labour Organization's Maternity Conventions.

Both Colombia and Canada have enacted legislation to protect pregnant employees mainly by implementing the right to a maternity leave period. It is important to note that these changes did not come from the employers, many of whom, in both countries, see maternity as a risk and a liability for their companies,²⁴⁴ hence the need to create legislation and legal accountability to protect the human rights of pregnant employees.

The length of the maternity leave has been recognized by the International Labour Organization as critical in aiding mothers to firstly, maintain the health of the mother and the child during the pregnancy period and secondly, to recover from childbirth and return

²⁴⁰ Williams, *supra* note 228 at 327.

²⁴¹ *Ibid* at 332.

²⁴² Scales, *supra* note 59.

²⁴³ Brooks, *supra* note 52. And C-410-94, *supra* note 144 at 94.

²⁴⁴ See, Natalia Ramírez Bustamante et al, "Maternity and Labor Markets: Impact of Legislation in Colombia" (2015), online: <http://www.banrep.gov.co/docum/Lectura_finanzas/pdf/be_870.pdf>; and Budak, *supra* note 205.

to work while providing care to their children during the first months of life.²⁴⁵ If the leave is too short, mothers might feel not ready to return to work, leading to attrition. On the other hand, when employees stay off work for an excessive period, they might lose important development opportunities, lose skills, and become disengaged, impacting performance and resulting in future wage penalties.²⁴⁶

ILO Convention No.03, article 3(a) states that a woman who has given birth “shall not be permitted to work during the six weeks following her confinement”. Later, Convention No. 183, in its article 4(1), established that “a woman to whom this Convention applies shall be entitled to a period of maternity leave of no less than fourteen weeks.” This period was extended to at least eighteen weeks by ILO Recommendation No. 191, paragraph 1(1). Colombia has ratified ILO Convention No. 03 but not ILO Convention No. 183 and Canada has not ratified either treaty. Regardless, both Colombia and Canada meet the standards established in ILO Conventions No. 03, 103 and 183. However, only Colombia²⁴⁷ and the provinces of Saskatchewan and Quebec have enacted legislation to reach the international non-binding goal of extending maternity leave to eighteen weeks, as established in ILO Recommendation No. 191. While the maternity leave in Colombia was extended to eighteen weeks, there is no parental leave for mothers. This means that women return to work directly after the eighteen weeks’ period. In Canada, however, the leave period can be extended further, for a total of 52 weeks for both maternity and parental leave under the Employment Insurance Act. It is important to note that the number of weeks allocated to maternity and parental leave, as well as the eligibility requirements for employment insurance benefits, vary from province to province.

The latent question that remains for policy creators is the ideal length of maternity leave – i.e. the leave that accrues only to mothers and not transferrable to fathers. Author Laura Colby discussed this issue by comparing the current legislation in United States of America and Europe. Concluding that women should always take at least six months of maternity leave, as this length of time represents the largest health benefits for mother

²⁴⁵ Addati, Cassirer & Gilchrist, *supra* note 110 at 8.

²⁴⁶ *Ibid* at 9.

²⁴⁷ In 2017, the Senate approved and implemented a modification to article 236 of the Labour Code extending the maternity leave from 14 weeks to 18 weeks.

and child.²⁴⁸ She also states that a leave that exceeds one year will often set women back professionally and slow down their career advancement, opportunity and labour force participation.²⁴⁹ Per Colby, the ideal length for women to stay off work, without impacting their careers, is from six months to one year. In other words, women should at least be able to enjoy twenty-six weeks of maternity leave to recuperate from childbirth. If we rely on Colby's article, Colombia and Canada will land below the "ideal" length for a maternity leave policy. Canada however, provides mothers with the opportunity of extending their leave to 52 weeks through parental benefits, which would observe the six-month recommended period.

It is also worth noting that, researchers have also analysed the economic benefits of the implementation of sound paid maternity leave policies, as they increase the likelihood that women will return to work after childbirth, improve employee morale and does not have an impact on workplace productivity.²⁵⁰

The next subsection will provide reflections on the topic of the recognition of the economic and social value of women's domestic and caretaking work in Canada and Colombia as it relates to maternity protections.

1.4.2 Domestic and Caretaking Activities – The Recognition of Women's Unpaid Work as it Relates to Maternity Protection

In Colombia as well as in Canada, there is a common perception of women's role as that of caregivers for their children and families. However, as women came out of their homes and into the paid work environment, issues such as maternity, breastfeeding, and domestic care arose. Employers tried to maintain the status quo, leading to disparate treatment of male and female workers. This disparate treatment and inequality in work

²⁴⁸ Laura Colby, "Can You Have Too Much Maternity Leave? In Europe, Maybe", *Bloomberg.com* (28 February 2017), online: <<https://www.bloomberg.com/news/articles/2017-02-28/can-you-have-too-much-maternity-leave-in-europe-it-s-possible>>.

²⁴⁹ *Ibid.*

²⁵⁰ Barbara Gault Ph D et al, "Paid parental leave in the United States: What the data tell us about access, usage, and economic and health benefits" (2014) Inst Womens Policy Res, online: <http://digitalcommons.ilr.cornell.edu/key_workplace/1600/?utm_source=digitalcommons.ilr.cornell.edu%2Fkey_workplace%2F1600&utm_medium=PDF&utm_campaign=PDFCoverPages> at 7.

environments forced women's rights advocates to push governments to prompt change through legislation and jurisprudence, to create a supportive workplace culture where women feel comfortable and safe to develop their productive and reproductive roles in society and effectively balance work-family responsibilities.²⁵¹

Colombia's approach to this recognition of domestic and caretaking duties is a legislative one, under which international agreements related to human rights are part of the "constitutional bloc", which means that an agreement receives constitutional strength after ratification. Women's rights are considered human rights and, as such, any convention or international agreement ratified by Colombia reaches the constitutional level with the power to change existing laws. Regarding the recognition and value of women's unpaid care and domestic work, Colombia has adopted legislation and developed jurisprudence conducive to recognizing, quantifying and protecting women dedicated to these activities. The Colombian Constitutional Court also recognizes that women have been historically oppressed which makes them vulnerable to abuse and disparate treatment. The Court has recognized that these groups do not need to prove their vulnerability and that the only way to restore equity is to implement temporary affirmative action, even if it means disparate treatment with respect to other non-oppressed groups. As such, the fact that women's care and domestic work have not been valued and recognized is just another consequence of a historically male-dominated culture that has oppressed women. To correct the disparate treatment, extensive legislation has been enacted, such as Law 1413/2010 and the creation of legislative protections to female "heads of the household", Community Mothers, as well as the extension of the constitutional job stability during pregnancy and breastfeeding to fathers and spouses of stay-at-home mothers who are pregnant and/or breastfeeding. The Colombian Constitutional Court has also recognized that women dedicate an average of seven hours to unpaid care and domestic work, which constitutes a double-shift for women that also work in the paid labour force. The Court has also recognized that legislation, government programs, unions and employers need to consider this double-

²⁵¹ See, Landsberg, *supra* note 49. Venne, *supra* note 3. Uprimny, Molano & Guzmán, *supra* note 33 at 22. Bustamante et al, *supra* note 233.

shift to facilitate the accommodation of female employees to improve wellness, performance and the achievement of balance between work and life for working mothers.

Canada has also identified the importance of valuing the care and domestic work of women. However, Canada has approached the issue indirectly by extending antidiscrimination protection for parents (fathers and mothers) due to family status. Also, the Canadian government has created monetary benefits and tax incentives for families with low income and for parents taking care of critically ill children or members of the family through compassionate care benefits. These incentives and benefits do not directly measure or add value to the hours that women spend on these activities, sometimes in addition to full-time paid positions.

ILO has recognized the importance of women's unpaid work as stated in ILO Convention No. 189, and on its Recommendation No. 201. These instruments invite State parties to start measuring the economic and social value of domestic and care work.²⁵² Furthermore, the ILO goes as far as stating that: "domestic workers are real workers. They are neither "members of the family", servants nor second-workers. Domestic workers must enjoy the same basic labour rights and guarantees as those available to other workers."²⁵³ Canada falls behind on following the ILO's recommendations with respect to domestic workers, though it should be recognized that has not ratified the ILO Convention. This issue is also connected to the lack of legal protection to informal work such as independent contractors and freelance workers, which, not surprisingly, represents one of the elements that cause the wage gap for working women in Canada. This subject will be developed in chapter 2 of this thesis.

Even though Canada and Colombia have enacted legal instruments to support women dedicated to care and domestic work, it seems that Colombia is progressing faster in meeting international standards with respect to valuing the unpaid labour activities of women. Indeed, Colombia's Constitutional Court recognized the economic value of the labour unpaid activities of women in decision T-494 of 1992.²⁵⁴ Based on this decision,

²⁵² McInturff, *supra* note 183.

²⁵³ Budlender, *supra* note 129.

²⁵⁴ T-494/92, *supra* note 133.

the Senate enacted law 1413 of 2010,²⁵⁵ to specifically regulate, measure and recognize, women's domestic work as a labour activity with economic value. However, recognizing and measuring alone is not enough, these legislative initiatives need to be accompanied by a social and economic support system to empower mothers dedicated to this kind of work. Without these systems in place, women and their children will continue depending on their husbands' income to support themselves, letting them vulnerable to acts of discrimination, violence and poverty.

²⁵⁵ *Ley 1413/10*, *supra* note 138.

CHAPTER 2

2. THE PRINCIPLE OF EQUAL PAY FOR WORK OF EQUAL VALUE

It is no secret that globally working women earn lower wages than men;²⁵⁶ This issue holds true for numerous countries and has been discussed at international and domestic levels for generations.²⁵⁷ Colombia and Canada are amongst those countries that have initiated legal efforts to eliminate inequalities for working women. The number of women joining the paid workforce in Colombia and Canada has been increasing exponentially for the past century. The World Bank, in its World Development Indicators website,²⁵⁸ reported that the female percentage of the total labour force in Canada increased from 44.1% in 1990 to 47.1% in 2014. In Colombia, the percentage of women in the labour force increased from 29.9% in 1990 to 42.6% in 2014. Furthermore, the International Labour Organization reported that the number of female workers in salaried and wage employment has increased by 3.7 percentage points between 2007 and 2017 compared to a male increase participation of 3.0 percentage points during the same period.²⁵⁹ The increased participation of women in the workforce has changed the work environment and led to important legislative changes, in answer to feminist questions, in both countries.²⁶⁰ The changes have not been initiated by employers and/or governments; these changes have been prompted by grassroots feminist groups that have raised the question of equality of remuneration and opportunity for working women.²⁶¹ The development of women's rights has been similar in both countries, with some differences rooted in various social, political, and cultural factors such as the armed conflict in

²⁵⁶ *World Employment and Social Outlook: Trends for Women 2017* (Geneva: International Labour Organization, 2017). (“[i]n Europe, for example “the overall gender pay gap reached close to 20%” at 16.)

²⁵⁷ Ministry of Labour, *supra* note 75. (“[g]ender wage gap – the difference between the earnings of men and women” at 3)

²⁵⁸ “DataBank: World Development Indicators”, online: *World Bank* <[#](http://databank.worldbank.org/data/reports.aspx?source=2&series=SL.TLF.TOTL.FE.ZS&country=CAN)>.

²⁵⁹ *World Employment and Social Outlook: Trends for Women 2017* (Geneva: International Labour Organization, 2017) at 13.

²⁶⁰ Luna, *supra* note 29 at 171.; Venne, *supra* note 3 at 5.; Landsberg, *supra* note 49.

²⁶¹ See Venne, *supra* note 3 at 6.; Luna, *supra* note 29.

Colombia and the dissimilar economic position of the two countries. Indeed, Colombia has a much lower gross domestic product (GDP) per capita than Canada, locating the country in the group identified as having an emerging economy.²⁶² Canada, on the other hand, is well positioned as a developed country.²⁶³ Colombia's economic conditions and prolonged internal armed conflict have limited the ability of the government to increase public spending on benefits to protect working women. Additionally, the different legal systems in Colombia and Canada delimit the development of jurisprudence and legislation enacted to protect working women.

Despite the attention and focus from international organizations such as ILO and UN, and the apparent support of both governments to achieve pay equity; the goal has proven to be evasive and difficult, with only small improvements through the years.²⁶⁴ This chapter will present, analyze and compare the legislation enacted by Canada and Colombia to implement the principle of equal pay for work of equal value. It will also present the issue of the gender wage gap within the international goals and standards contained in United Nations agreements and ILO Conventions. Additionally, it will outline how the feminist goal of “questioning everything”, including male-created legal systems of financial reward and their effects on the lives of working women, is linked to the pay equity discussion.²⁶⁵

Before entering this analysis, it is important to acknowledge the impact of intersectionality when discussing feminist topics. Factors such as race, nationality, disability and religion, amongst others, cannot be separated from the individual and will necessary influence the way that women approach work. Intersectionality adds yet another layer to the issues faced by working women, as well as to the elements that cause

²⁶² *World Economic Situation and Prospects 2014* (Development Policy and Analysis Division of the Department of Economic and Social Affairs of the United Nations Secretariat, 2014).

²⁶³ *Ibid.* (“[w]ESP classifies all countries of the world into one of three broad categories: developed economies, economies in transition and developing economies. The composition of these groupings, specified in tables A, B and C, is intended to reflect basic economic country conditions” at 1.)

²⁶⁴ See *Concluding Observations on the 7th and 8th reports of Colombia*, *supra* note 17.; *CEDAW Concluding Observations on 8th and 9th reports of Canada*, *supra* note 17.; *General Recommendation No. 19: Violence Against Women*, *CEDAW Rec 19, 11th Sess, UN Doc, A/47/38 (1992)* [*CEDAW General Recommendation No.19*].

²⁶⁵ Baer, *supra* note 59 at 2.; Scales, *supra* note 59 at 1384.

unequal treatment in pay.²⁶⁶ Despite the importance of the element of intersectionality in feminist studies, it exceeds the scope and purpose of this research. The analysis proposed in this thesis, however, leaves the door open for new research within this vast topic.

2.1 International Standards and Goals shared by Colombia and Canada with Respect to Equal Pay for Work of Equal Value

Colombia and Canada, as members of the International Labour Organization and the United Nations, are party to numerous legally-binding international treaties and documents that create a legal framework with a common social function and goal: to achieve equality of wages and opportunities for working women. This common legal framework starts with the UN's Universal Declaration of Human Rights (UDHR).²⁶⁷ The UDHR recognizes work as a fundamental human right necessary for the development of the individual.²⁶⁸ Article 23 is directly about the principle of pay equity, stating that "everyone, without discrimination, has the right to equal pay for equal work."²⁶⁹ Note that UN used the term "equal pay for equal work" which harmonizes the compensation of women and men performing the same jobs under the same conditions. This concept ignores the feminist theory of differentiation, by which the law should be analysed using social reality as a guide for each individual case.²⁷⁰ It also ignores the issues of systemic discrimination, normalized in the work environment and gender-based occupational segregation.²⁷¹ Segregation of occupation refers to the issue that certain jobs have higher concentrations of male employees and are viewed as 'male' jobs. These are generally remunerated at a higher rate than jobs perceived as those with higher concentrations of women workers, hence perceived as being 'female' by nature.²⁷² This chapter will later

²⁶⁶ Avtar Brah & Ann Phoenix, "Ain't IA woman? Revisiting intersectionality" (2013) 5:3 J Int Womens Stud 75 at 80.; Cynthia E Gitt & Marjorie Gelb, "Beyond the Equal Pay Act: Expanding Wage Differential Protection Under Title VII" (1976) 8 Loy U Chi LJ 723 at 758.

²⁶⁷ *UDHR*, *supra* note 10.

²⁶⁸ *Ibid* at art 23.

²⁶⁹ *Ibid* at art 23(2).

²⁷⁰ Scales, *supra* note 59 at 1387.

²⁷¹ See Marie-Thérèse Chicha & ILO InFocus Programme on Promoting the Declaration on Fundamental Principles and Rights at Work, *A comparative analysis of promoting pay equity: models and impacts* (Geneva: ILO, 2006) at 5.; Gitt & Gelb, *supra* note 255 at 725.

²⁷² Chicha, *supra* note 260

refer in detail to the issue of segregation when presenting the elements of the gender wage gap in Colombia and in Canada.

After the UDHR, and recognizing the underlying challenges with the principle of equal pay for equal work, the ILO in 1951, developed the principle of equal pay for equal work into equal pay for work of equal value, and adopted the Equal Remuneration Convention, No. 100,²⁷³ and its accompanying Equal Remuneration Recommendation No. 90. This fundamental convention²⁷⁴ requires ratifying countries to ensure the application to all workers of the principle of equal remuneration for men and women for work of equal value. By changing its language from equal work to work of equal value, the ILO addressed the issues of systemic discrimination and segregation by establishing a system of comparisons needed to establish the real value of work, based on characteristic different from sex.²⁷⁵ The Convention entered into force on May 23, 1953, and it was ratified by Canada on November 16, 1972, and by Colombia on June 7, 1963. It is currently in force for both countries. The UN also recognised the importance of this principle as the basis for the development of any successful economic system that fosters the effective accomplishment of women within the paid workforce.²⁷⁶ Following the enactment of Convention No. 100, in 1958, the ILO crafted the Discrimination (Employment and Occupation) Convention No. 111,²⁷⁷ together with its Discrimination (Employment and Occupation) Recommendation No. 111.²⁷⁸ This Convention was ratified by Canada in 1964 and by Colombia in 1969 and it calls on State parties to “promote, by methods appropriate to national conditions and practice, equality of

²⁷³ *Convention (No. 100) concerning equal remuneration for men and women workers for work of equal value*, 29 June, 1951, 2181 UNTS 165.

²⁷⁴ ILO has identified eight conventions as “fundamental”. These fundamental conventions refer to subjects that are considered as essential principles and rights at work, such as: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.” See ILO, “Conventions and Recommendations”, online: *Int Labour Organ* <<http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>>.

²⁷⁵ Budlender, *supra* note 242 at 34, 38.

²⁷⁶ *Transforming our World: the 2030 Agenda for Sustainable Development*, *supra* note 122.

²⁷⁷ *Convention (No. 111) concerning discrimination in respect of employment and occupation*, 25 June, 1958, 5181 UNTS 362.

²⁷⁸ *Recommendation (No. 111) concerning discrimination in respect of employment and occupation*, ILO Recommendation of 25 June, 1958, 42nd Sess.

opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.”²⁷⁹ The enactment of these two fundamentals conventions go to show that ILO identifies unequal wages as a form of discrimination against women; and calls for State parties, such as Colombia and Canada, to introduce changes into their domestic legal systems to eliminate this and all forms of discrimination against working women.

The principle of equal pay for work of equal value is also mentioned in the International Covenant on Economic, Social, Cultural Rights’ article 3 in the following terms: “The States parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.” Article 7 states:

States parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.²⁸⁰

Last but not least important, the 1979 Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), ratified by Canada and Colombia, requires in article 11(1)(d) that

States parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: ...

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work²⁸¹

Based on the shared responsibilities contained in these international agreements, both Canada and Colombia have joined the efforts to create and enact domestic legislation to

²⁷⁹ ILO Convention No. 111, *supra* note 266.

²⁸⁰ *International Covenant on Economic, Social and Cultural Rights*, 16 December, 1966, 993 UNTS, Can TS 1996 No.46.

²⁸¹ *CEDAW*, *supra* note 11 at 11(d).

comply with the principles stated by international instruments to eradicate inequality of wages for women.

The next subsections of this chapter will present the most important legal elements introduced into domestic legal systems by the Canadian and Colombian governments to eliminate the gender wage gap. As a preamble to these subsections, suffice it to say that both Canadian and Colombian jurisprudence have recognized that the gender wage gap represents discrimination against working women and it is systemic in nature.²⁸² The causes of the wage gap are numerous and complex; they stem from a history of disparate treatment based on stereotypes and social roles.²⁸³ This research work will present the elements identified by Canada and Colombia as contributors to inequality of wages for women such as: discrimination; occupational segregation; maternity and caregiving activities; and access to education.²⁸⁴ The next section of this chapter will begin by analyzing how Colombian legislation and jurisprudence has evolved to address these factors in the search of achieving equality for working women. After that, it will then perform a similar analysis of how Canada has done the same.

2.2 The Development of Pay Equity Legislation in Colombia

Colombian women have come a long way since the achievement of the right to vote and the right to own property in the 1886 Constitution, to the recognition of equality rights in all areas of life, in the Constitution of 1991.²⁸⁵ However, they continue to fight for the effective achievement of equality in employment because, despite enacted legal protections, issues of disparate treatment continue to be common. Certainly, women have increased their participation in the paid labour market for the last century. The National Statistics Department reported that, in the period between March and May 2016, the

²⁸² Beatriz Londoño Toro et al, *Los Derechos de las Mujeres en la Jurisprudencia de la Corte Constitucional Colombiana 2005-2009* (Bogotá, Colombia: Universidad del Rosario, Grupo de Investigación en Derechos Humanos, Facultad de Jurisprudencia, 2011) at 125. This seems to only refer to Colombia – does she also discuss Canada?

²⁸³ Budlender, *supra* note 242 at 34, 38.; Ministry of Labour, *supra* note 75 at 33.

²⁸⁴ Alejandro Badel & Ximena Pena, *Decomposing the Gender Wage Gap with Sample Selection Adjustment: Evidence from Colombia* (Research Division Federal Reserve Bank of St. Louis, 2010) at 2.; Ministry of Labour, *supra* note 75.; Budlender *supra* note 243.

²⁸⁵ Uprimny, Molano & Guzmán, *supra* note 33 at 11.; Luna, *supra* note 29 at 171.

percentage of employed women was 54.2%.²⁸⁶ This statistic shows that women represent half of the workforce in Colombia. However, the unemployment rate for the same period was 7.3% for men and 12% for women,²⁸⁷ showing a gender gap in employment and the first sign of inequality for women seeking employment in the paid sector of the economy.

To address the issues related to discrimination of women in employment, the government have enacted extensive pay equity legislation. However, the disparate treatment of working women in Colombia continues to concern the CEDAW Committee. These concerns were reflected in the concluding observations on the combined seventh and eighth periodic reports of Colombia by the Committee the Committee declared that “the high female unemployment rate, the considerable pay gap between women and men, and the occupational segregation of women”²⁸⁸ continue to be a concern that prevents the country from achieving equality for women. In the same report, the Committee also expressed preoccupation about the percentage of the female population working in the informal sector with no access to social security benefits.²⁸⁹

Pay equity rights for working women in Colombia are protected by a complex legal system of international agreements and domestic legislation, which place the main responsibility for achieving equity for women on the government. To comply with its international obligations of eliminating discrimination and achieving equality for working women, the Colombian government promulgated and enacted regulations to protect the equal pay for equal work principle. Starting with article 13 of the Constitution which states that all Colombians are born free and equal before the law. The same article also creates the government’s responsibility of ensuring real and effective equality without discrimination.²⁹⁰ Also, article fifty-three of the Constitution provides Congress with the responsibility for enacting labour legislation that reflects the rights of equality of opportunities, compensation proportional to the quantity and quality of work, and

²⁸⁶ *Mercado Laboral por Sexo* (Bogotá, Colombia: Departamento Administrativo Nacional de Estadística (DANE), 2016).

²⁸⁷ *Ibid.*

²⁸⁸ *Concluding Observations on the 7th and 8th reports of Colombia*, *supra* note 17.

²⁸⁹ *Ibid* at 9.

²⁹⁰ *Constitución de Colombia*, *supra* note 23 at art 13.

stability of jobs.²⁹¹ As mandated in article fifty-three of the Constitution, Congress enacted the Labour Code that, in article 10 protects the right of equality of female and male employees, with the same rights and protections before the law.²⁹² Furthermore article 143, that was modified by article seven of Law 1496 of 2011, states that there should be no differences in the salary earned in jobs with the same nature, shifts and conditions of employment.²⁹³ After reading this article, it is immediately noticeable the use of the equal pay for equal work principle, instead of the application of equal pay for work of equal value as established in ILO's Convention No. 100.²⁹⁴ The same article in numeral two states that employers should not create different wages based on characteristics such as age, gender, sex, nationality, race, religion, public opinion, or participation on bargaining units.²⁹⁵ Also, the third part of the article allows different wages for jobs of similar nature and declares that salary differences should only be based on objective factors of differentiation.²⁹⁶ The Constitutional Court has referred to these factors in decision T-833 of 2012, explaining that the pay equity principle should be understood as equal pay for equal work,²⁹⁷ meaning that the Court applies a proportionality test when deciding cases of disparate compensation. This test entails providing the same compensation to jobs with the same functions, shifts and responsibility.²⁹⁸ The Court also allows cases where the difference in remuneration is justified by elements that are objective, understandable and reasonable.²⁹⁹ Furthermore, the Court provides a list of reasons that justify difference in salaries for employees performing similar jobs. These justifiable reasons are: firstly, elements of performance; secondly, the different structures amongst public organizations where public employees perform work; and thirdly, the different classifications and salary rates established for public workers.³⁰⁰ These interpretations of the Court indicate that the Constitutional

²⁹¹ *Ibid* at 53.

²⁹² *Código de Trabajo*, *supra* note 156, p art. 10.

²⁹³ *Ibid*, art. 143.

²⁹⁴ *T-833-2012, MP Luis Ernesto Vargas Silva*, 2012 Corte Constitucional de Colombia (available on <http://www.corteconstitucional.gov.co/relatoria/2012/T-833-12.htm>) at II (5).

²⁹⁵ *Código de Trabajo*, *supra* note 156, art. 143 s (2, 6).

²⁹⁶ *Ibid*, art.143 s (3).

²⁹⁷ *T-833-2012*, *supra* note 283 at s II (1).

²⁹⁸ *Ibid* at s II (3).

²⁹⁹ *Ibid* at s II (5).

³⁰⁰ *Ibid* at s II (6).

principle of pay equity is understood as equal pay for equal work rather than equal pay for work of equal value. However, the Court also establishes that the differences in remuneration should not be based on sex or on any other protected ground, as this will constitute discrimination.³⁰¹

Other regulations that refer to pay equity are: article 14 of Law 581 of the year 2000, that protects pay equity between men and women working in the public sector;³⁰² article five of Law 823 of 2003, that creates the obligation for government bodies to create and effectively implement strategies to reduce the wage gap between male and female workers; and article 12 of Law 1257 of 2008, that entitles the Ministry of Social Protection to monitor the effective implementation of strategies created to foster the equal pay principle.³⁰³ This law also created a system of protections for female victims of violence and discrimination.³⁰⁴ While Law 1257 will be examined in detail in Chapter 3 of this thesis, it is worth noting that this law refers the issue of unequal pay for equal work as part of the definition of violence against women.³⁰⁵ The same law, in article twelve, gives the Ministry of Social Protection the obligation of protecting working women by eliminating any form of discrimination and by ensuring the real and effective achievement of pay equity.³⁰⁶

The great number of laws enacted to protect the right of women to receive equal remuneration makes it difficult to understand how that Colombia has not been able to achieve this important international standard and yet, as presented before, the CEDAW Committee continues to report that equality has not been achieved, demonstrating that legislation alone is not enough. The Committee recommended that the government of Colombia implement a National Plan for Employment Equity with the purpose of achieving equality for working women.³⁰⁷ As such, the Colombian government created

³⁰¹ *Ibid* at s II (5).

³⁰² *Ley 581 de 2000 - Participación Política de la Mujer*, Diario Oficial No. 44.026, 31 mayo 2000 [*Ley 581/2000*] at art 14.

³⁰³ *Ley 823 de 2003 - Normas sobre igualdad de oportunidades para las mujeres*, Diario Oficial 45.245, 10 July 2003 [*Ley 823/03*] at 823.

³⁰⁴ *Ley 1257 de 2008 - Normas de Sensibilización, Prevención y Sanción de formas de violencia contra las mujeres*, Diario Oficial No. 47193, 4 December 2008 [*Ley 1257/08*] at 12.

³⁰⁵ *Ibid* at art. 3 (d).

³⁰⁶ *Ibid* at 12.

³⁰⁷ *Concluding Observations on the 7th and 8th reports of Colombia*, *supra* note 17 at s 28(b).

the National Program of Labour Equality with a Gender Specific Focus.³⁰⁸ Through this program, the government assumed the obligation of addressing the issues of discrimination against women by creating public policies and programs to not only temporary adjust the labour market with short term effects, but also to create a tangible, substantive change in the employment conditions of working women. It did so by implementing technological innovation and change, and modernizing the production system, to accommodate the diverse invaluable talent of women in the workplace, with stable and long-lasting effects in the labour market.³⁰⁹

The gender wage gap continues to be a concern for working women in Colombia; thus, this research will present some of the factors that have been identified as causes of the gender wage gap in Colombia.

2.2.1 The Gender Wage Gap in Colombia

Despite the enactment of legislation to reduce the wage gap, the 2016 Global Gender Gap Report ranks Colombia in 39th place within 144 countries in the global gender gap index, and 28th in the economic participation and opportunity category. As per the same index, Colombia has developed negatively from 2006 when it ranked 22nd for the global gender gap but has improved in the economic and participation category rank of 39th in 2006.³¹⁰

To eliminate the issues caused by unequal pay, Colombian scholars and jurists have been searching for the factors associated with inequality of earnings between men and women. Their research has unveiled several complex interrelated elements causing inequality for working women. Some studies identify factors such as occupational segregation, discrimination, education, maternity and parenthood.³¹¹ Researchers Liliana Olarte and Ximena Pena³¹² have focused their attention on maternity as a central element creating a negative effect on the income of working women in Colombia. They have calculated that

³⁰⁸ Ministerio de Trabajo, ed, *Program Nacional de Equidad Laboral con Enfoque Diferencial de Genero* (Ministerio de Trabajo, 2013).

³⁰⁹ *Ibid.*

³¹⁰ *Global Gender Gap Report 2016.*

³¹¹ Badel & Pena, *supra* note 273.; Liliana Olarte, Ximena Peña & others, “El Efecto de la Maternidad sobre los Ingresos Femeninos” (2010) 28:63 Rev Ens Sobre Política Económica 190.

³¹² Olarte, et al, *supra* note 300.

Colombian mothers earn an average of 17.6% less than women with no children.³¹³ The gap increases to 18.4% when children are less than five years of age.³¹⁴ They also point out that the elements of the wage gap are often part of a systemic issue caused by various interrelated elements. For example, occupational segregation and discrimination often act in relation with motherhood in increasing pay inequities. Indeed, mothers are most likely to work in part-time, casual and contract work (with no benefits and lower wages) to harmonize their family and work responsibilities, causing an overrepresentation of women in these sectors.³¹⁵

2.2.1.1 Factors Contributing to the Gender Wage Gap in Colombia

Discrimination is another important element identified as causing wage discrepancies for working women. Feminist jurists and scholars have argued that equality is difficult to achieve because issues of disparate treatment are systemic and normalized by a legal system that is male-biased and that ignores the experiences of women.³¹⁶ To address this issues, they call for a revision in the legal method to create new doctrines, new methods and new proposals for law reform that take into consideration women's experiences and perspectives.³¹⁷ These concepts are relevant to the Colombian legal system, with regard to causes of pay inequity for working women. In a study of the gender wage gap, performed by the research division of the Federal Reserve Bank of St. Louis using data from the Colombian Household Survey by the Colombian Statistics Department, researchers identified that Colombian women experience both a "glass ceiling effect"³¹⁸ and a "quicksand floor effect" for wages.³¹⁹ The "glass ceiling" refers to women in highly-paid jobs who experience lower salaries with respect to their male peers, and "quicksand floor" which refer to women working in informal or part-time jobs with lower than the

³¹³ *Ibid* "[t]his effect is sometimes called the penalty for maternity" at 193.

³¹⁴ *Ibid* at 192.

³¹⁵ Olarte, et al, *supra* note 300 at 210.

³¹⁶ Scales, *supra* note 59 at 1394.; Baer, *supra* note 59 at 316.

³¹⁷ Baer, *supra* note 59 at 316.

³¹⁸ Alejandro Badel & Ximena Pena, *supra* note 271 at 2. ("[a] substantial gender gap at the top quantiles of wage distribution is commonly refer as a "glass ceiling effect"" at 2).

³¹⁹ Alejandro Badel & Ximena Pena, *supra* note 271. ("[w]e refer to the sizable gap observed at the bottom of the distribution as a "quicksand floor effect"" at 2.)

minimum wage income.³²⁰ These two trends are usually caused by systemic discrimination normalized in the work culture and the society at the two extremes of the distribution.³²¹ In other words, women experience gender wage gap at the top and at the bottom of the distribution, and the gap is reduced in areas where women's earnings are in the middle.³²² The reduction of the wage gap in the middle of the distribution is explained by the enactment of minimum wage legislation, that imposes a set hourly wage for all employees;³²³ These results go to show that the enactment of minimum wage legislation as well as collective bargaining is effective in addressing the wage gap, mainly due to their gender neutral approach.³²⁴

The wage gap at the top end of the distribution, is known as the “glass-ceiling” effect and includes high skilled workers such as professional job categories. At this level the differences in pay may be caused by involuntary elements such as, discriminatory practices produced by gender bias and stereotypes when negotiating and securing women's compensation packages or voluntary acts, such as, women's own decisions.³²⁵ Certainly, women may decide take positions considered to have less responsibility, less or more flexible hours, and less pay to balance effectively their work and family duties.³²⁶

To eliminate the elements of pay inequity, it is necessary to perform a restructuring of the legal system in place to protect women from discrimination. In Colombia, however, pay equity is understood under the premise of equal pay for equal work, providing equal pay amongst workers in the same jobs, with the same responsibilities.³²⁷ This approach does little eliminate systemic discrimination, and occupational segregation.³²⁸ An effective system of pay equity requires a proactive approach of the law that implements a system

³²⁰ *Ibid.*

³²¹ *Ibid.* (“[t]he “distribution” refers to the sample under scrutiny. In this case one extreme of the distribution are working women with the lowest income and the opposite end would represent working women with high income.”)

³²² *Ibid.*

³²³ *Ibid.*

³²⁴ *Ibid* at 20.; Budlender *supra* note 248 at 3.

³²⁵ Alejandro Badel & Ximena Pena, *supra* note 271 at 20.

³²⁶ Linda Wirth, *Breaking Through the Glass Ceiling - Women in Management* (Geneva: International Labour Office, 2004) at 1.

³²⁷ *T-833-2012*, *supra* note 283 at s II (5).

³²⁸ Linda Wirth, *supra* note 315 at 210.

of gender-neutral comparisons of the value of each job.³²⁹ It is also important that governments, employers and unions work on identifying the barriers caused by systemic discrimination caused by gender bias and stereotypes, and eliminate them from their hiring, promotion and compensation practices. On the other hand, the ILO has indicated the importance of helping women harmonize their productive and family responsibilities to achieve effective equality.³³⁰ This can be achieved “by adopting and implementing inclusive laws and policies for effective protection”³³¹ and by recognizing that employees have responsibilities outside of work, and incorporating this recognition into collective agreements and labour and employment legislation.³³²

The “quicksand floor” effect, experienced by Colombian workers, refers to the concentration of female employees at the bottom of the distribution, and represents an area of concern that is again caused by various interrelated elements of the wage gap.³³³ For example, the “quicksand floor” effect is closely connected to the overrepresentation of women in part-time, contract and domestic unpaid work.³³⁴ Indeed, there is a strong percentage of women who perform unpaid domestic and caretaking activities that, despite being recognized as economic labour activities, remain unpaid and informal.³³⁵ These jobs are also ineligible for social security benefits and not covered by minimum wage laws. In this case, legislation can also be effective in decreasing the wage gap by extending labour laws to formalize the jobs of women working in precarious, unpaid and part-time jobs, making them eligible for social security benefits.³³⁶

Occupational segregation is defined as the overrepresentation of women in certain careers or fields identified as feminine and the underrepresentation of women in male-dominated careers and/or jobs.³³⁷ Occupational segregation can be horizontal or vertical. Horizontal

³²⁹ *Concluding Observations on the 7th and 8th reports of Colombia*, *supra* note 17 at 27 (d).

³³⁰ Addati, Cassirer & Gilchrist, *supra* note 110 at 116.

³³¹ *Ibid.*

³³² *Ibid* at 110,116.; Laís Wendel Abramo & Rosalba Todaro, “Costos Laborales y Reproducción Social en América Latina” in International Labour Office, ed, *Trab Decente Equidad Género En América Lat*, 1. ed ed (Vitacura, Santiago de Chile: Oficina Internacional del Trabajo, 2006) at 151.

³³³ Badel & Pena, *supra* note 273 at 12.

³³⁴ *Ibid* at 20.

³³⁵ Laís Wendel Abramo & International Labour Office, eds, *Trabajo decente y equidad de género en América Latina*, 1. ed ed (Vitacura, Santiago de Chile: Oficina Internacional del Trabajo, 2006) at 76.

³³⁶ Badel & Pena, *supra* note 273 at 20.

³³⁷ Ministry of Labour, *supra* note 75 at 35.

segregation occurs amongst different occupations at the same level of responsibility and income, and vertical segregation happens when women are underrepresented in highly remunerated roles with increased obligations and responsibilities.³³⁸ In Colombia, the issue of occupational segregation remains, as presented in a 2017 statistics report from DANE: 34% of working women in Colombia work in the hospitality segment, 30.5% in social and care services, and 40% are self-employed.³³⁹ These statistics demonstrate that the clear majority of working women do so in the informal sector, followed by women working in hospitality and social work. Occupational segregation can be voluntary when women make career decisions in the search for a more balanced family-work life,³⁴⁰ or involuntary, by being channelled by socio-cultural pressures into certain job areas that fit with gender norms.³⁴¹ In any case, occupational segregation is nourished by the underlying issue of systemic discrimination, institutionalized in a society that creates invisible barriers for women due to gender-based stereotypes and social norms, normalized by a male-created legal environment that ignores women's experiences.³⁴² The issues, causes and remedies of discrimination against working women in Colombia are important and deserve a thorough, careful analysis; as such they will be addressed in detail in chapter 3 of this thesis. This subsection will now address the element of education as a factor to gender wage gap.

In Colombia, women are more likely to join and graduate from post-graduate education programs than men. The Ministry of Education reported that from 2001-2014, the percentage of women graduating from post-graduate programs was 54.7% compared to 45.3% of men, with women graduating from technical (50.8%), university (56.9%) and specialization (57.3%) programs, and men from technical-professional (61.3%), masters' degree (53.3%) and doctorate degree (62.9%) programs.³⁴³ Despite the high number of women graduating from post-graduate programs, they earn approximately 14.2% less

³³⁸ *Ibid* at 35, 41.

³³⁹ *Informes Especiales Mercado Laboral: Trimestre Móvil febrero - abril 2017* (Bogotá, Colombia: Departamento Administrativo Nacional de Estadística (DANE), 2017) at 4.

³⁴⁰ Budlender, *supra* note 242 at 22.

³⁴¹ *Ibid* at 24.; Abramo & Todaro, *supra* note 321 at 77.

³⁴² Scales, *supra* note 59.; Baer, *supra* note 59.

³⁴³ Erika Lucia Villamil Fajardo, Lady Cifuentes & Nayda Lucy Vázquez Venegas, *Perfil Académico y Condiciones de Empleabilidad: Graduados de Educación superior (2001-2014)* (Bogotá, Colombia: Ministerio de Educación, 2016) at 26.

than their male peers in their first job within the year after graduation.³⁴⁴ The wage gap in graduates persists in all areas; but is more manifest in health sciences, where the gap reaches a staggering 18.4%, followed by human sciences, social sciences and engineering.³⁴⁵ These troublesome statistics, and the fact that women's unemployment rate is 12%, compared to a 7.3% rate for men,³⁴⁶ illustrate that, in Colombia, the element of education, even though important, does not have a positive impact in addressing the issue of the gender wage gap. These results also reflect the persistence of "patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women in the family and society"³⁴⁷ in Colombia. The CEDAW Committee has identified that these stereotypes and patriarchal attitudes are the cause of women's difficult position in the labour market, causing gender segregation and impacting their educational choices.³⁴⁸ The Committee has recommended that the government develop a proactive strategy to change the patriarchal and stereotypical attitudes about women's roles in employment.³⁴⁹ Also, the Committee recommended that the government liaise with employers, women's organizations, political parties and education professionals and other private and public organizations, to "disseminate the principles of non-discrimination and gender equality."³⁵⁰ The Committee refers to the subject of intersectionality, indicating that the awareness and education programs should focus on women from native and afro-Colombian communities, because members of these groups tend to experience higher levels of discrimination due to their sex, aboriginal status and race.³⁵¹

In conclusion, the factors causing the wage gap in Colombia are numerous, complex and interrelated.³⁵² However, the main factor is the continuation of negative stereotypes of women's role and responsibilities.³⁵³ These negative stereotypes are encompassed by a

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid* at 15,16.

³⁴⁶ note 273.

³⁴⁷ *Concluding Observations on the 7th and 8th reports of Colombia*, *supra* note 17 at 3.

³⁴⁸ *Ibid* at 12.; *CEDAW General Recommendation No.19*, *supra* note 251.

³⁴⁹ *Concluding Observations on the 7th and 8th reports of Colombia*, *supra* note 17 at 12.

³⁵⁰ *Ibid.*

³⁵¹ Bundlender, *supra* note 242 at 23.

³⁵² *Concluding Observations on the 7th and 8th reports of Colombia*, *supra* note 17 at 12.; Budlender *supra* note 242 at 34.

³⁵³ Littleton, *supra* note 101 at 1283.; Scales, *supra* note 59 at 1400.

history of discrimination and oppression, often overlooked by a male-created legal system that ignored the experiences of women and their capacity to perform well in any area of employment. To better achieve the international standards of pay equity, legislation needs to be reviewed to better reflect the principle of equal pay for work of equal value, as described in ILO Convention No. 100,³⁵⁴ stepping away from the equal pay for equal work principle currently being used in the Constitutional Court's jurisprudence.³⁵⁵ However, legislation alone is not enough to produce social change. As recommended by the CEDAW Committee, Colombia's government should implement programs to educate women, men, girls and boys, to change deep-rooted negative stereotypes about women's role in the society.³⁵⁶ These programs should also be directed to employers and union leaders, to help them identify, address and eliminate the issues of systemic discrimination in the workplace normalized by gender bias.³⁵⁷ For example, they must identify and eliminate hiring practices that offer more remuneration to male new graduates over female graduates with the same experience and education.

On the positive side, minimum wage legislation and collective agreements have been identified as effective in reducing the wage gap for working women.³⁵⁸ To better use these valuable tools; labour legislation needs to be extended in Colombia to protect women working in the informal sector, making them eligible for social security protection, including maternity leave.

After analysing the legal system enacted to achieve pay equity as well as some the more relevant elements that cause the wage gap in Colombia, this chapter will now present the legal framework and elements of the existing wage gap for Canadian working women.

³⁵⁴ Budlender, *supra* note 242 at 3.; *Concluding Observations on the 7th and 8th reports of Colombia*, *supra* note 17 at s 28(a).

³⁵⁵ T-833-2012, *supra* note 283 at s 5.

³⁵⁶ *Concluding Observations on the 7th and 8th reports of Colombia*, *supra* note 17 at 28(d), 12.; CEDAW General Recommendation No.19, *supra* note 253.

³⁵⁷ *Concluding Observations on the 7th and 8th reports of Colombia*, *supra* note 17 at 12, 28.

³⁵⁸ Budlender, *supra* note 242 at 38.; *Concluding Observations on the 7th and 8th reports of Colombia*, *supra* note 17 at s 28 (d).

2.3 The Development of Pay Equity Legislation in Canada

One of the most important issues for working women in Canada is securing appropriate and equal remuneration for work performed in the paid labour force. This section will focus on the federal and provincial legislation enacted to attain the goal of achieving equal pay for work of equal value for Canadian working women. This section will also refer to the factors associated with the gender wage gap, such as occupational segregation, education, discrimination,³⁵⁹ and caregiving activities.³⁶⁰

In Canada, both the federal and provincial legislatures have enacted laws to protect the right of working women to receive equal pay for work of equal value. At the federal level, the Canadian Constitution, in section 15 of the Charter of Rights and Freedoms, protects the equality rights of every individual and prohibits discrimination with the exception of ameliorative programs or affirmative action, to favor members of historically oppressed groups and to achieve goals such as equality for women.³⁶¹ Also, the Canadian Human Rights Act, enacted in 1977, contains the initial approach to leveling wages between men and women and embracing the equal pay for work of equal value principle. In its section II, the Human Rights Act states that “it is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees in the same establishment, who are performing work of equal value.”³⁶² However, it establishes a complaints-based approach, where women seeking remedy should file a human rights complaint with the Human Rights Commission for investigation. Since the implementation of the Act, the Commission has investigated more than 400 pay equity complaints, some of which have been dismissed, however others resulted in negotiations impacting approximately 1500 employees and totalling \$8 million dollars in settlement.³⁶³

³⁵⁹ Discrimination is analyzed in more detail in Chapter 3 of this document.

³⁶⁰ Caregiving activities, unpaid domestic work and maternity are addressed in Chapter I of this document.

³⁶¹ *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11* [*The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11*] at s 15.

³⁶² *Canadian Human Rights Act, RSC 1985, c H-6* [*Canadian Human Rights Act, RSC 1985, c H-6*] at s 11.

³⁶³ *Time for action: special report to Parliament on pay equity* (Ottawa: Canadian Human Rights Commission, 2001) at 9.

Canadian women's demand for equal pay fostered comparisons of jobs to establish fair pay-grids for occupations requiring similar skills, education, training, experience, efforts and responsibilities. The Equal Wages Guidelines of 1986 was created to provide guidance on the application of the equal pay for work of equal value principle established in the Human Rights Act by presenting a process to assess the value of work based on four comparison factors: skill, effort, responsibility and working conditions.³⁶⁴ The 1984 Royal Commission on Equality in Employment chaired by Madame Justice Rosalie Abella and known as 'The Abella Commission', crafted the term "employment equity" and produced recommendations to achieve it.³⁶⁵ The report was the basis of the 1986 Employment Equity Act, which was later amended in 1995.³⁶⁶

However, the achievement of equal wages for men and women in Canada has been slow, pointing to a flaw in the enacted system. In 2001, the Human Rights Commission issued 'Time for Action: Special Report to Parliament on Pay Equity'. The document reported that the slow advancement was caused by the complaints-based approach established in the Human Rights Act.³⁶⁷ This approach does little to address the root causes of pay inequity, such as systemic discrimination that has been normalized by the work culture.³⁶⁸ It also creates incentives and opportunities for delay in addressing the issues of discrimination, as it requires women to file claims to address cases of discrimination in pay practices.³⁶⁹ The Commission recommended the implementation of a proactive approach for protecting women from uneven salaries. This proactive approach should include the creation of an independent pay equity body that oversees the effective implementation of pay equity as a fundamental human rights principle.³⁷⁰ Following this recommendation, the federal government initiated, in 2004, a review of federal pay equity legislation, through a Pay Equity Task Force (known as the Bilson Task Force). After examination of the existing legislation, the Task Force concluded that the enacted system is not effective in achieving pay equity, mainly because it relies on the

³⁶⁴ *Equal Wages Guidelines, 1986, SOR/86-1082* [*Equal Wages Guidelines, 1986, SOR/86-1082*].

³⁶⁵ Abella, *supra* note 50 at 6.

³⁶⁶ *Employment Equity Act, SC 1995, c 44, supra* note 51.

³⁶⁷ CHRC, *supra* note 352 at 11.

³⁶⁸ *Ibid* at 9.

³⁶⁹ *Ibid* at 11.

³⁷⁰ *Ibid* at 18.

willingness of employers to implement changes in their organizations to move toward pay equity.³⁷¹ To address the pressing issues in legislation, the Task Force makes 113 recommendations, which include legislative changes to introduce a more proactive approach, with clear and consistent criteria and established deadlines for compliance.³⁷² It also recommends the creation of specialized agencies to oversee the process and increased union responsibility to achieve pay equity.³⁷³ The government response to the report was that it did not provide an adequate blueprint for pay equity implementation for federally-regulated employees.³⁷⁴

More recently, on June 9, 2016, the Special Commission on Pay Equity issued the “It’s Time to Act Report”, proposing the creation of proactive pay equity legislation for federal public service employees, crown corporations and federally-regulated employers with more than fifteen employees.³⁷⁵ The government responded on October 5, 2016, stating that it strongly believes in the principle of equal pay for work of equal value and the fair treatment of all workers regardless of gender, and commits to developing the much needed proactive pay equity reform for the federal jurisdiction.³⁷⁶ Indeed, Canada has implemented extensive human rights legislation to protect women from discrimination, and this is the main remedy for Canadian women experiencing pay inequity.³⁷⁷ Unfortunately, to reach equal pay, women must go through a lengthy legal process to first establishing whether the pay gap is caused by discriminatory practices.³⁷⁸

The development of the pay equity principle has also been introduced in the employment legislation at the provincial level. Currently, pay discrimination on the grounds of gender

³⁷¹ *Pay equity: a new approach to a fundamental right: Pay Equity Task Force final report 2004* (Ottawa: Pay Equity Task Force, 2004) at 97,98.

³⁷² *Ibid* at chapters 4 and 5.

³⁷³ Overall, collective bargaining has proven effective in protecting equality rights. The lack of attention by the government to reforming labour laws is largely filled by the outcomes of collective bargaining. *see ibid* at chapter 16. Treasury Board of Canada Secretariat, ed, *The Public Sector Equitable Compensation Act and the reform of pay equity* (Ottawa: Treasury Board of Canada Secretariat, 2013) at 2.

³⁷⁴ Treasury Board of Canada Secretariat, *supra* note 360 at 2.

³⁷⁵ *It’s time to act - Report of the special committee on pay equity* (Ottawa: House of Commons, 2016) at 12.

³⁷⁶ House of Commons, Special Committee on Pay Equity, *Government Response to the Recommendations of the Report of the Special Committee on Pay Equity: It’s Time to Act*. (2016) at 1.

³⁷⁷ Mary Cornish, *Canadian Remedies for Gender Pay Discrimination* (Ottawa, Canada, 2013) at 20,21.

³⁷⁸ CHRC, *supra* note 352 at 11.

is prohibited by human rights legislation in British Columbia,³⁷⁹ Alberta,³⁸⁰ Ontario³⁸¹ and Saskatchewan.³⁸² Equal pay for same or similar work is a requirement for employment standards legislation in Ontario,³⁸³ Manitoba,³⁸⁴ and Yukon.³⁸⁵ Pay equity or equal pay for work of equal value is legally required in separate pay equity legislation for the public sector in Manitoba,³⁸⁶ Nova Scotia,³⁸⁷ New Brunswick³⁸⁸ and Prince Edward Island³⁸⁹ and for the public and private sectors (over 10 employees) in Quebec³⁹⁰ and Ontario.³⁹¹ In Ontario, the Pay Equity Act requires employers to adjust the wages of employees in female-dominated job classes when they are not equal to the wages of employees in male-dominated job classes comparable in value based on skill, effort, responsibility and working conditions.³⁹²

In Canada, pay equity legislation has been implemented at the federal, provincial and territorial levels to reduce the wage gap and achieve pay equity. However, it has been unsuccessful in achieving its goals, and as a response the government has launched numerous investigations and reviews that have endorsed the impending need of changing pay equity legislation to achieve effective equality of wages for working women.³⁹³

Another added issue identified by the analysis of current legislation is that all the legislation relies on employers to implement changes into their workplaces to achieve pay equity.³⁹⁴ Unfortunately, the complex language of the law requires the use of consultants

³⁷⁹ *Human Rights Code, RSBC 1996, c 210* [*Human Rights Code, RSBC 1996, c 210*] at 12(1).

³⁸⁰ *Alberta Human Rights Act, RSA 2000, c A-25.5* [*Alberta Human Rights Act, RSA 2000, c A-25.5*] at 6(1).

³⁸¹ *Human Rights Code, RSO 1990, c H.19, supra* note 45 at 23(1).

³⁸² *The Saskatchewan Human Rights Code, SS 1979, c S-24.1* [*The Saskatchewan Human Rights Code, SS 1979, c S-24.1*] at 16(1).

³⁸³ *Employment Standards Act, 2000, SO 2000, c 41, supra* note 45 at 42.

³⁸⁴ *The Employment Standards Code, CCSM c E110* [*The Employment Standards Code, CCSM c E110*] at 82(1).

³⁸⁵ *Human Rights Act, RSY 2002, c 116* [*Human Rights Act, RSY 2002, c 116*] s 15; *Employment Standards Act, RSY 2002, c 72* [*Employment Standards Act, RSY 2002, c 72*] s 44.

³⁸⁶ *The Pay Equity Act, CCSM c P13* [*The Pay Equity Act, CCSM c P13*].

³⁸⁷ *Pay Equity Act, RSNS 1989, c 337* [*Pay Equity Act, RSNS 1989, c 337*].

³⁸⁸ *Pay Equity Act, SNB 2009, c P-5.05* [*Pay Equity Act, SNB 2009, c P-5.05*].

³⁸⁹ *Pay Equity Act, RSPEI 1988, c P-2* [*Pay Equity Act, RSPEI 1988, c P-2*].

³⁹⁰ *Pay Equity Act, CQLR c E-12.001* [*Pay Equity Act, CQLR c E-12.001*].

³⁹¹ *Pay Equity Act, RSO 1990, c P.7, supra* note 45.

³⁹² *Ibid* at 5.

³⁹³ Treasury Board of Canada Secretariat, *supra* note 362 at 12.

³⁹⁴ CHRC, *supra* note 352 at 12.

and experts to examine a system of occupational comparisons.³⁹⁵ The use of experts is now commonplace in the public sector, but not necessarily in other sectors, which might not have access to these resources. To help with the implementation of pay equity legislation, in large corporations union leaders are paid to negotiate the best working conditions for members of their union, male and female, and are successful in achieving salary grids based on factors different from sex.³⁹⁶ While this helps to create a positive trend for pay equity, the reality is that, according to Statistics Canada, the “rate of unionization has fallen from 37.6% in 1981 to 28.8% in 2014,”³⁹⁷ leaving numerous working women alone in the fight for their right to equal compensation.

After reviewing the legal scheme enacted in Canada to achieve the international principle of equal pay for work of equal value, this chapter will now analyze different elements identified as causes of the persistent gender wage gap in Canada.

2.3.1 The Gender Wage Gap in Canada

Despite the enactment of legislation and the production of several reports to achieve pay equity in Canada and to reduce the gender wage gap, Canada is improving at a slow rate in achieving equal pay for working women. In fact, Canada seems to be falling behind when compared to other countries, as reported in the 2016 Global Gender Gap Report, where Canada ranked in 35th place amongst 144 countries, and 36th in the economic participation and opportunity category. As per the same report, Canada has developed negatively from 2006 when it ranked 14th for the global gender gap, and 10th in the economic and participation category.³⁹⁸ Furthermore, and as explained in the introduction of this chapter, comments and recommendations from the CEDAW Committee also point out to the slow development of Canada on this important subject.³⁹⁹ The government of Canada has initiated several attempts to reduce and eliminate the gender wage gap in Canada, however the lack of a proactive legislation have done little in tackling the root

³⁹⁵ *Ibid* at 11,12.

³⁹⁶ Budlender, *supra* note 242 at 38.

³⁹⁷ Statistics Canada Government of Canada, “Unionization rates falling”, (26 May 2015), online: <<http://www.statcan.gc.ca/pub/11-630-x/11-630-x2015005-eng.htm#def1>>.

³⁹⁸ note 297.

³⁹⁹ CEDAW *Concluding Observations on 8th and 9th reports of Canada*, *supra* note 17 at 37,38.

causes of the gap.⁴⁰⁰ These causes are several, complex and often interrelated, hence the difficulty in creating a comprehensive list of elements causing the gender wage gap.⁴⁰¹ However, there is consensus in the theory that the issue of disparate treatment is underlined by systemic discrimination that comes from negative stereotypes of women's roles and obligations in their families and in the society.⁴⁰²

2.3.1.1 Factors Contributing to the Wage Gap in Canada

International organizations and governments have been able to identify some common factors that contribute to the wage gap in Canada. For example, the Ontario Ministry of Labour identified some of the factors associated with the gender wage gap: systemic discrimination, occupational segregation, caregiving and maternity activities, workplace culture, and education as the most important elements causing the gender wage gap in Ontario.⁴⁰³ The Ministry noted that these factors often overlap, interconnect and are difficult to identify due to unconscious bias that underscores the lives of working women.⁴⁰⁴ These same factors were also identified by the CEDAW Committee as causing the wage gap at the national level,⁴⁰⁵ and by the ILO, which noted that many factors that remain unexplained should be attributed to discrimination.⁴⁰⁶ Chapter 1 addressed the issue of maternity and Chapter 3 will discuss the issue of discrimination. Thus, this subsection will consider occupational segregation and education as factors in the wage gap in Canada.

Occupational segregation was defined earlier in this chapter's analysis of the wage gap in Colombia, and refers to the overrepresentation of women in certain jobs caused by different reasons. In Canada, the issue initiated when women decided to leave their

⁴⁰⁰ CHRC, *supra* note 352.

⁴⁰¹ Ministry of Labour, *supra* note 75 at 33.

⁴⁰² Chicha & ILO InFocus Programme on Promoting the Declaration on Fundamental Principles and Rights at Work, *supra* note 258 at 5,6,7.; Kate McInturff & Paul Tulloch, *Narrowing the Gap - The Difference that Public Sector Wages Make* (Canada: Canadian Centre for Policy Alternatives, 2014) at 10.

⁴⁰³ Ministry of Labour, *supra* note 75 at 33.; *Global wage report, 2016/17: wage policies in times of crisis* (Geneva: International Labour Office, 2016) at 31.

⁴⁰⁴ Ministry of Labour, *supra* note 75 at 32, 33.

⁴⁰⁵ CEDAW *Concluding Observations on 8th and 9th reports of Canada*, *supra* note 17 at 38(a)(b).

⁴⁰⁶ Budlender, *supra* note 242 at 16.

homes and enter the remunerated workforce, and were channelled into professions that were perceived to be female because of their link to caregiving. This created an overrepresentation of women in jobs such as nursing, and teaching, causing segregation of women's participation in these jobs.⁴⁰⁷ Currently, Canadian women remain to be perceived as the main caregivers for children and other members of their family, and continue to be overrepresented in careers viewed as feminine.⁴⁰⁸ In a study performed in 2014, the results showed that Canadian women with post-secondary education training were most likely to be teachers, nurses, and office workers; while men with post-secondary training were more likely to work in finance, technology, and engineering occupations.⁴⁰⁹ These trends continue today, as reported by a 2017 Statistics Canada report.⁴¹⁰

The issue of segregation continues to exist in today's labour market and is connected to the wage gap, because of the undervalued nature of jobs considered to be female.⁴¹¹ This systemic undervaluing of women's work finds its base in numerous factors such as: the existence of social and cultural norms and/or beliefs that underestimate women's work and their capacity to perform well in jobs and/or industries historically filled by men;⁴¹² and by systemic discrimination caused by a legal system that ignores women's voices.⁴¹³ A good example of the systemic discrimination caused by negative stereotypes, endured by women when joining the workforce, can be found in the Supreme Court of Canada judgment of *CN v. Canada (Canadian Human Rights Commission)*.⁴¹⁴ In this case, the Supreme Court of Canada decided to reverse the opinion of the Federal Court of Appeal and restore the decision of the Human Rights Tribunal, appointed by the Canadian Human Rights Commission; which found Canadian National Railway Company (CN)

⁴⁰⁷ Cooke-Reynolds & Zukewich, *supra* note 104 at 25.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ McInturff & Tulloch, *supra* note 391 at 7.

⁴¹⁰ Melissa Moyer, *Women in Canada: A Gender-based Statistical Report* (Statistics Canada, 2017) at 23, 24.

⁴¹¹ *Ibid* at 28, 29, 30.

⁴¹² Chicha & ILO InFocus Programme on Promoting the Declaration on Fundamental Principles and Rights at Work, *supra* note 260 at foreword.; Budlender, *supra* note 242 at 4, 17.

⁴¹³ Scales, *supra* note 59.

⁴¹⁴ *CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 (C) (available on <http://canlii.ca/t/11pg8>).

guilty of discriminatory recruitment, hiring and promoting practices by systemically preventing and discouraging employment opportunities to women in certain unskilled ‘blue-collar’ positions.⁴¹⁵ In its decision, the Human Rights Tribunal, appointed by the Canadian Human Rights Commission, directed CN to create a special employment program that would increase to 13% the proportion of women working in non-traditional occupations within that corporation.⁴¹⁶ To achieve this number, CN was mandated to hire at least one woman for every four non-traditional jobs filled.⁴¹⁷ In 1974, CN, at the request of its former President, Robert Bandeen, launched an investigation of CN’s work environment. This resulted in a report known as the ‘Canadian National Action Programs – Women’, which identified issues with respect to pay inequity: the lack of definitive executive management commitment to equality; the traditional beliefs by managers in the many negative myths and stereotypes about working women; and CN’s personnel policies and procedures.⁴¹⁸ Some of the attitudes and perceptions of CN’s male employees toward women included statements such as: “women are generally disruptive in the workplace”; “women aren’t tough enough to handle supervisory jobs”; “they fail miserably under pressure”; “women have no drive, no ambition and no initiative”; “the best jobs for women are coach cleaners – That’s second nature to them”; “unless I’m forced, I won’t take a woman.”⁴¹⁹ The results of the report showed a microcosm of disparate treatment caused by systemic discrimination normalized by workplace policies and procedures crafted under negative perceptions and stereotypes of women’s work, role and responsibilities.

The Supreme Court addressed the issue of occupational segregation by enforcing anti-discrimination legislation as enacted in the Canadian Human Rights Act.⁴²⁰ The Court defined systemic discrimination in employment by applying the elements in the Abella Report,⁴²¹ and pointed to the existence of negative stereotypes of women’s roles and

⁴¹⁵ *Ibid.*; *Re CNR Co and Canadian Human Rights Commission*, 1985 C (available on <http://canlii.ca/t/g92tv>); *Action Travail des Femmes v Canadian National Railway*, 1984 C (available on <http://canlii.ca/t/1g8ks>).

⁴¹⁶ *Action Travail des Femmes v. Canadian National Railway*, *supra* note 404.

⁴¹⁷ *Ibid.*

⁴¹⁸ *Ibid.*

⁴¹⁹ *Ibid* at 1120.

⁴²⁰ *Canadian Human Rights Act*, *supra* note 351.

⁴²¹ Abella, *supra* note 50 at 9,10.

capabilities in Canadian workplaces. The Court also mentioned the need for proactive attitudes to eliminate these negative perceptions. In this regard, the Court stated that:

systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job" (see the Abella Report, pp. 9-10). To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged.⁴²²

The Court refers to the systemic discrimination normalized by stereotypes and biases of women's roles and capabilities in the work-environment, and the importance of challenging and shifting discriminatory practices and policies.

Another example of the discriminatory impact that gender biases and stereotypes have in the work environment, and that women are subjected to when moving into male-dominated fields, is the experiences of women working in the Canadian police and armed forces.⁴²³ As described by Bonnie R. Schmidt, in her book *Silenced*, women have endured serious struggles and widespread discriminatory treatment while serving in the Royal Canadian Mounted Police; from disparate treatment in pay, roles, responsibilities and training, to inappropriately designed uniforms, sexual harassment and rape.⁴²⁴

Furthermore, researchers have found that people who are employed in an occupation associated with the opposite gender, such as women working in the armed forces, are penalized more harshly for making mistakes than those performing in professions dominated by members of their own gender identity; creating yet another area of gender

⁴²² *CN v. Canada (Canadian Human Rights Commission)*, *supra* note 403 at 1138.

⁴²³ The RCMP has recently been the focus of sexual harassment, bullying and discrimination against women. In a class action that consolidated claims from Janet Merlo (BC 2012) and Linda Davidson (ON 2015), see *Merlo v Canada*, 2017 FC 51 (available on <http://canlii.ca/t/gx010>).; Furthermore, a recent review of the issue of workplace harassment in the RCMP, showed that the institution has not implemented comprehensive measures to eliminate harassment against women. The report made eight recommendations, including the revision of policies and cultural change for the RCMP to effectively eliminate the issue of harassment, bullying and abuse of authority. See *Report into Workplace Harassment in the RCMP* (Civilian Review and Complaints Commission for the RCMP, 2017).; The same occupational segregation and pay equity issues are found in the Canadian military as established in Marie Deschamps, *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces* (External Review Authority, 2017).

⁴²⁴ Bonnie Reilly Schmidt, *Silenced* (Halfmoon Bay, British Columbia: Caitlin Press Inc., 2015).

discrimination in employment.⁴²⁵ This issue, however important, exceeds the topic of this chapter, but further demonstrates the complexity and extent of the issues caused by discriminatory practices normalized in the workplace.

Occupational segregation is also connected to the issue of women working in the informal sector. Indeed, as in Colombia, working women in Canada are also overrepresented in the part-time, contract and self-employment areas.⁴²⁶ These types of jobs offer more time-flexibility, aiding women in achieving family-work balance, but lack the protection of employment and labour laws. As such they tend to be ill-remunerated, unstable and offer limited access to legal protections.⁴²⁷ They have also been identified as a concern by the CEDAW Committee,⁴²⁸ and by the Canadian Human Rights Commission⁴²⁹ both of which called for a change in employment and labour legislation that provides formalization of precarious jobs.⁴³⁰

This subsection will now turn to a consideration of education levels and pay equity. In Canada women are, in general terms, better educated than men.⁴³¹ As reported by Statistics Canada, from an early age girls receive better grades than boys, they are also more likely to graduate from high school and to enroll in a college or university.⁴³² The statistics show that Canadian girls and women are completing their diplomas and degrees in greater numbers than boys and men: “between 1990 and 2015 the proportion of women with university degrees increased from 13.7% to 35.1%. During the same period, the proportion of men with a university degree increased from 17.1% to 28.6%”.⁴³³

⁴²⁵ Victoria L. Brescoll, Erica Dawson and Eric Luis Uhlmann, (2010) Hard Won and Easily Lost: The Fragile Status of Leaders in Gender-Stereotype-Incongruent Occupations, *Physiological Science*, 21(11) p. 1640

⁴²⁶ Moyer, *supra* note 756.

⁴²⁷ McInturff & Tulloch, *supra* note 391 at 7. Ministry of Labour, *supra* note 75 at 36,35.: Vereinte Nationen, ed, *Women's control over economic resources and access to financial resources, including microfinance*, World survey on the role of women in development 2009 (New York, NY: United Nations, 2009) at 28.

⁴²⁸ CEDAW Concluding Observations on 8th and 9th reports of Canada, *supra* note 17.

⁴²⁹ CHRC, *supra* note 352.

⁴³⁰ *Ibid.*

⁴³¹ Moyer, *supra* note 759 at 8.

⁴³² *Ibid.*

⁴³³ *Ibid.*

In Canada, gains in employment income have been made by women as they join professions once dominated by men. This trend could be caused by the general increase in the proportion of female university graduates in all instructional programs.⁴³⁴ However it does change the overrepresentation of women working in certain female areas. For example: in 1991, at least 20% of all employed women ages 25 to 34 with a university degree were distributed in only three occupations: registered nurses, elementary school and kindergarten teachers, and secondary teachers.⁴³⁵ By 2011, the proportion of female workers rose in nearly all major occupations held by university graduates.⁴³⁶ The most significant gains were amongst health policy researchers, consultants and program officers (raised from 47% to 76%), specialists in human resources (57% to 78%), and general practitioners and family physicians (from 43% to 62%).⁴³⁷

It is not clear how education impacts the wage gap in Canada; certainly, the increased levels of women's education reduce the labour employment gap but it does not eliminate the wage gap.⁴³⁸ If men and women received the same compensation based on education levels, we would expect highly-educated women to earn the same as highly-educated men. However, this is not the case in Canada, although a higher level of education does impact women's employment levels. For example:

[i]n 2015, the employment rate of women with a high school diploma was 69.3% compared to 83.1% for those with a university degree—a difference of 13.8 percentage points. The employment rate of men with a high school diploma was 81.9% compared to 89.9% for those with a university degree—a difference of 8.0 percentage points.⁴³⁹

The data suggests that education will factor into women's success in attaining a job, more than it would for men. This could very well point to the presence of biases and negative

⁴³⁴ Sharanjit Uppal & Sébastien LaRochelle-Côté, "Changes in the occupational profile of young men and women in Canada" (2014) Insights Can Soc, online: <https://www.researchgate.net/profile/Sharanjit_Uppal/publication/309350988_Changes_in_the_occupational_profile_of_young_men_and_women_in_Canada/links/580a451708ae2cb3a5d2ffe3/Changes-in-the-occupational-profile-of-young-men-and-women-in-Canada.pdf>.

⁴³⁵ Moyer, *supra* note 759 at 8.

⁴³⁶ Uppal & LaRochelle-Côté, *supra* note 423.

⁴³⁷ *Ibid.*

⁴³⁸ Moyer, *supra* note 759 at 8.

⁴³⁹ *Ibid.*

stereotypes about women's skills and work proficiencies based on traditional gender roles.⁴⁴⁰

Authors who sustain that higher education levels are associated with a smaller wage gap are assuming that employers create compensation agreements based on skills and professional development characteristics and that these are provided by higher levels of education. On the contrary, Canadian employment and earnings statistics show that the wage gap persists across all education levels.⁴⁴¹ For example, “[w]omen earned an average of \$25.38 per hour in 2014, while their male counterparts earned an average of \$28.92. It follows that women earned \$0.88 for every dollar earned by men”.⁴⁴² These labour market trends would point to the conclusion that increasing levels of education do not necessarily lead to a decrease in the wage gap across Canada.⁴⁴³ They would also demonstrate that: firstly, the current work environment is inefficient in achieving equality for women at work, as it does not place the value of work on skill, effort, responsibility and working conditions, as dictated in pay equity provisions;⁴⁴⁴ and secondly, the undying presence of systemic discrimination in human resources policies and practices in Canadian workplaces.⁴⁴⁵

In conclusion, Canadian women are feeling the effects of unequal pay for work of equal value resulting in a gender wage gap. As discussed above, over time this gap has decreased, but at a slower rate than the amount of legislation would suggest. Canada has pay equity legislation of different types at the federal, provincial and territorial levels. As explained before, pay discrimination on the grounds of gender is prohibited by human rights legislation in British Columbia,⁴⁴⁶ Alberta,⁴⁴⁷ Ontario⁴⁴⁸ and Saskatchewan.⁴⁴⁹ Equal pay for same or similar work is a requirement for employment standards legislation in

⁴⁴⁰ *Ibid.*

⁴⁴¹ *Ibid* at 28.

⁴⁴² *Ibid* at 26.

⁴⁴³ *Ibid* at 8.

⁴⁴⁴ *Equal Wages Guidelines, 1986, SOR/86-1082, supra* note 351 at pp 3,4,5,6,7,8.

⁴⁴⁵ CHRC, *supra* note 352 at 6,7.

⁴⁴⁶ *Human Rights Code, RSBC 1996, c 210 [Human Rights Code, RSBC 1996, c 210] s 12(1).*

⁴⁴⁷ *Alberta Human Rights Act, RSA 2000, c A-25.5 [Alberta Human Rights Act, RSA 2000, c A-25.5] s 6(1).*

⁴⁴⁸ *Human Rights Code, RSO 1990, c H.19 [Human Rights Code, RSO 1990, c H.19] s 23(1).*

⁴⁴⁹ *The Saskatchewan Human Rights Code, SS 1979, c S-24.1, supra* note 369 at 16(1).

Ontario,⁴⁵⁰ Manitoba,⁴⁵¹ and Yukon.⁴⁵² Pay equity, or equal pay for work of equal value, is legally required in separate pay equity legislation for the public sector in Manitoba,⁴⁵³ Nova Scotia,⁴⁵⁴ New Brunswick⁴⁵⁵ and Prince Edward Island⁴⁵⁶ and for the public and private sectors (over 10 employees) in Quebec⁴⁵⁷ and Ontario.⁴⁵⁸

Legislation is a powerful tool in the implementation of the equal pay for equal work principle, and it has proven effective in areas such as minimum wage and collective bargaining. As reflected in ILO's Convention No. 100,⁴⁵⁹ the principle of equal pay for work of equal value should be integrated into domestic legislation and included in the collective bargaining process.⁴⁶⁰ For example, collective bargaining units are essential in the negotiation, implementation and review process of job evaluation methods to determine the value of work in an objective, non-discriminatory manner. Hence, strengthening collective bargaining for effective social dialogue is imperative to achieve and maintain the principle of equal pay for work of equal value.⁴⁶¹

However, legislation alone is not effective in addressing some of the elements that cause the gender wage gap, such as the elimination of gender stereotypes and biases of women's work, roles and responsibilities. To address these, the CEDAW Committee recommends the creation of programs to change negative biases about women's role in the society.⁴⁶²

Overall, the gender wage gap is detrimental for the development of women as individuals, and to the Canadian economy as it impacts the income of numerous women who are sole parents, main breadwinners or simply trying to succeed and develop their

⁴⁵⁰ *Employment Standards Act, 2000*, SO 2000, c 41, *supra* note 45 at 42.

⁴⁵¹ *The Employment Standards Code*, CCSM c E110, *supra* note 371 at 82(1).

⁴⁵² *Human Rights Act*, RSY 2002, c 116 [*Human Rights Act*, RSY 2002, c 116] s 15; *Employment Standards Act*, RSY 2002, c 72 [*Employment Standards Act*, RSY 2002, c 72] s 44.

⁴⁵³ *The Pay Equity Act*, CCSM c P13, *supra* note 373.

⁴⁵⁴ *Pay Equity Act*, RSNS 1989, c 337, *supra* note 374.

⁴⁵⁵ *Pay Equity Act*, SNB 2009, c P-5.05, *supra* note 375.

⁴⁵⁶ *Pay Equity Act*, RSPEI 1988, c P-2, *supra* note 376.

⁴⁵⁷ *Pay Equity Act*, CQLR c E-12.001, *supra* note 377.

⁴⁵⁸ *Pay Equity Act*, RSO 1990, c P.7, *supra* note 45.

⁴⁵⁹ *Convention (No.100) concerning equal remuneration for men and women workers for work of equal value*, 23 May 1953, 165 UNTS 303 [*ILO Convention No.100*].

⁴⁶⁰ note 259 at 38.

⁴⁶¹ *Ibid.*

⁴⁶² *CEDAW Concluding Observations on 8th and 9th reports of Canada*, *supra* note 17 at 37(b).

careers while balancing work and family responsibilities.⁴⁶³ As such, the CEDAW Committee has recommended that the government take all measures necessary to narrow the wage gap, including adopting:

effective measures, including skills training and incentives for women to work in non-traditional professions, and temporary special measures to achieve substantive equality of women and men in the labour market and eliminate occupational segregation, both horizontal and vertical, in the public and private sectors, and adopt quotas to enhance the representation of women in managerial positions in companies.⁴⁶⁴

There is no doubt that reducing the wage gap is a priority for Canada;⁴⁶⁵ however, achieving this evasive goal will require continued collaboration between feminist scholars, leaders, governments, employers, unions, and other civil and political organizations, in the amendment, and implementation of proactive pay equity legislation, and the elimination of systemic discrimination in Canadian workplaces.

After reviewing legislation and some factors of the wage gap, it is clear that the issue of unequal pay is complex and extensive. The final part of this chapter will provide a summary of the main findings and reflections about the issue of achieving equal pay for work of equal value for women in Canada and in Colombia.

2.4 Final Remarks

Equal pay for work of equal value is an essential human right for working women, which is closely related to their positive and effective development as an active part of the society. This human right has been recognized in treaties ratified by both countries such as the Equal Remuneration Convention, No. 100⁴⁶⁶ (and its accompanying Equal Remuneration Recommendation No. 90); the Discrimination of Employment and Occupation Convention No. 111⁴⁶⁷ (and its Recommendation on Discrimination in Employment and Occupation No. 111); the International Covenant on Economic, Social

⁴⁶³ McInturff & Tulloch, *supra* note 391 at 11.; Ministry of Labour, *supra* note 75 at 8.

⁴⁶⁴ CEDAW *Concluding Observations on 8th and 9th reports of Canada*, *supra* note 17 at 39(b).

⁴⁶⁵ Ministry of Labour, *supra* note 75.; Pay Equity Task Force, *supra* note 360.; CHRC, *supra* note 352.

⁴⁶⁶ *ILO Convención No. 100*, *supra* note 15.

⁴⁶⁷ *ILO Convention No. 111*, *supra* note 14.

and Cultural Rights;⁴⁶⁸ and the CEDAW.⁴⁶⁹ The international legal framework is enacted to establish a set of standards and goals for Colombia and Canada to achieve their obligations, including introducing changes to domestic legislation to protect, promote and maintain equality for women.⁴⁷⁰ In response to these international obligations, both countries have enacted domestic legal systems of statutes, jurisprudence and policies with the purpose of eliminating the gender wage gaps in employment and achieving pay equity for women. However, to this date neither Canada nor Colombia have fully achieved this important goal.⁴⁷¹

To address the issue of gender inequality, Canada's governments have implemented extensive human rights,⁴⁷² labour,⁴⁷³ employment,⁴⁷⁴ and pay equity,⁴⁷⁵ legislation at federal, provincial and territorial levels. Canada has also organized studies and research initiatives that have resulted in numerous reports and recommendations on legislative changes to eliminate sex discrimination and achieve equality for women in employment, such as Abella's 'Equality in Employment Report'; the Human Rights Commission's 'Time for Action: Special Report to Parliament'; and the Special Commission on Pay Equity's 'It's Time to Act Report'.⁴⁷⁶ The government has responded by reinstating its commitment to pay equity, however, it has been slow in implementing the recommended actions. For example, in the 'Time for Action Report', the Human Rights Commission recognized the limited reach of the claims-based pay equity legislation currently in place and suggested that the government focus on introducing legislative changes to reflect a more proactive approach of pay equity legislation at a federal level.⁴⁷⁷ The Human Rights

⁴⁶⁸ ICESCR, *supra* note 13.

⁴⁶⁹ CEDAW, *supra* note 11.

⁴⁷⁰ ILO Convention No.100, *supra* note 15 at art.2.

⁴⁷¹ Moyer, *supra* note 759 at 26.; *supra* note 326 at 4.

⁴⁷² *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11* [*The Constitution Act 1982*]. *Canadian Human Rights Act, RSC 1985, c H-6*, *supra* note 349.; *Alberta Human Rights Act, RSA 2000, c A-25.5*, *supra* note 367. *Human Rights Act, RSY 2002, c 116*, *supra* note 372.; *Human Rights Code, RSBC 1996, c 210*, *supra* note 366.; *Human Rights Code, RSO 1990, c H.19*, *supra* note 45.; *The Saskatchewan Human Rights Code, SS 1979, c S-24.1*, *supra* note 369.

⁴⁷³ *Equal Wages Guidelines, 1986, SOR/86-1082*, *supra* note 351.

⁴⁷⁴ *Employment Equity Act, SC 1995, c 44*, *supra* note 51. *Employment Standards Act, 2000, SO 2000, c 41*, *supra* note 45.; *The Employment Standards Code, CCSM c E110*, *supra* note 371.

⁴⁷⁵ *Pay Equity Act, CQLR c E-12.001*, *supra* note 377.; *Pay Equity Act, RSNS 1989, c 337*, *supra* note 374.; *Pay Equity Act, RSO 1990, c P.7*, *supra* note 45.; *Human Rights Code, RSBC 1996, c 210*, *supra* note 366.

⁴⁷⁶ Abella, *supra* note 50.; CHRC, *supra* note 352.; Pay Equity Task Force, *supra* note 360.

⁴⁷⁷ CHRC, *supra* note 352 at 11.

Commission recommended: eliminating the claims-based approach currently enacted; moving the main responsibility of achieving pay equity from employers to governments and unions; recognizing that pay equity is a human right and creating an independent agency to overview the implementation of pay equity legislation.⁴⁷⁸ These changes harmonize with recommendations made by the ILO and UN for State parties to achieve pay equity; however, they have been somewhat ignored by the government. The Commission's recommendations are mainly directed to legislation at federal level; even though the federal government cannot impose legislative changes at the provincial and territorial levels, these changes tend to be later adopted by the province and territories, leading to incremental positive legislative change on pay equity at a national level. To date, the suggestions have not been fully implemented and Canada fails to achieve its international obligations regarding pay equity. Even though the gap seems to be closing, Canada is falling behind when compared to other countries. This slow development is reflected in the 2016 Global Gender Gap Report.⁴⁷⁹ Furthermore, and as explained in the introduction to this chapter, comments and recommendations from the CEDAW Committee also point to a slow development of Canada on this important subject.⁴⁸⁰

Colombia's approach has been different than that of Canada, mainly because of its centralized civil code legal system. Indeed, Colombia has tackled the issue of disparate treatment in employment by creating a complex system of laws and legal standards to achieve its international obligations.⁴⁸¹ The Constitutional Court has interpreted the constitutional legal right of pay equity as equal pay for equal work, and has established a proportionality test based on characteristics such as type and place of work, to establish appropriate remuneration amongst employees.⁴⁸² However, this approach has not been successful in achieving the evasive goal of equality for women. Despite the enactment of

⁴⁷⁸ *Ibid* at 9, 17.

⁴⁷⁹ Ministerio de Trabajo, *supra* note 297.

⁴⁸⁰ CEDAW Concluding Observations on 8th and 9th reports of Canada, *supra* note 17 at 37,38.

⁴⁸¹ *Constitución de Colombia*, *supra* note 23.; *Código de Trabajo*, *supra* note 156.; *Ley 581/2000*, *supra* note 289.; *Ley 1413/10*, *supra* note 138.; *Ley 1429/2010*, *supra* note 168.; *Ley 1257/08*, *supra* note 291.; *Ley 82/93*, *supra* note 145.

⁴⁸² T-833-2012, *supra* note 283.

legislation to reduce the wage gap, the 2016 Global Gender Gap Report also ranks Colombia as dropping from 22nd to 39th place.⁴⁸³

Notwithstanding the enactment of domestic legislation, and the implementation of several programs and reports by the two countries, the fundamental principle of equal pay for work of equal value has proven difficult to achieve. However, the ILO has recognized that Canada and Colombia are not alone in failing to achieve this important standard and have declared it a global problem.⁴⁸⁴ The ILO identified that the wage gap is caused in part by several complex, interrelated factors such as discrimination, maternity and parental responsibilities, domestic work, informal work, self-employment, and segregation of occupation, amongst many others.⁴⁸⁵ However, it also recognizes that many factors associated with the wage gap are unidentified, pointing to a remaining presence of systemic discrimination based on negative stereotypes about women's roles and obligation in their families and in society.⁴⁸⁶ Unfortunately, the issue of systemic discrimination against women in employment is reflected in both Canadian and Colombian workplaces, hindering the advancement of achieving equality for women in employment.⁴⁸⁷ Hence, to achieve equality, there is an imperative need to change the Canadian and the Colombian work-cultures to eliminate the issues caused by systemic discrimination normalized by years of practices and policies, that are based on negative stereotypes of women's roles (productive and reproductive), responsibilities and capabilities, in the workplace.⁴⁸⁸ It is also necessary to introduce the requirements of a changing more diverse⁴⁸⁹ workforce into legislation, where norms and policies are

⁴⁸³ Ministerio de Trabajo, *supra* note 297.

⁴⁸⁴ *Supra* note 243 at 16.

⁴⁸⁵ *Ibid.*

⁴⁸⁶ *Ibid.*

⁴⁸⁷ CEDAW *Concluding Observations on 8th and 9th reports of Canada*, *supra* note 17 at 38.; note 75.; *Concluding Observations on the 7th and 8th reports of Colombia*, *supra* note 17.; Ministerio de Trabajo, *supra* note 295.

⁴⁸⁸ Ministerio de Trabajo, *supra* note 295.; *supra* note 75.; *supra* note 362.; *supra* note 350.

⁴⁸⁹ It is important to note that women who are members of indigenous, visible minorities, disabled, or immigrants or refugees also face additional intersectional barriers to achieving pay equity. Women from these groups will experience higher levels of disparate treatment when joining the paid labour force, including lower wages than their male and female colleagues. Although intersectionality is an important factor to consider when analysing women's rights, it exceeds the scope of this thesis, however it leaves the door open to further examination. See, Brah & Phoenix, *supra* note 253.

reviewed and modified adopting, answering and reflecting women's questions, needs and experiences.⁴⁹⁰

Not all efforts enacted by Colombia and Canada to achieve equality have been fruitless. Legislative tools implemented by the two countries, such as established minimum wage norms and collective bargaining, have demonstrated their effectiveness in leveling the income of employees based on gender neutral characteristics.⁴⁹¹ However, despite their effectiveness, many working women do not have access to these legal protection, because of an overrepresentation of women working in the informal, unpaid and self-employment sectors. To address these issues, the CEDAW Committee has recommended that Colombian and Canadian legislation should extend to cover people working in these sectors.

Overall, this chapter has reviewed and compared the differences and similarities in women's pay equity rights in Colombia and in Canada. It has also been able to present that the laws enacted are insufficient to achieve the international standards of equal pay for work or equal value. There is, indeed, an impending need for a law reform to level the income of working women in the two countries. Also, as presented in this chapter, legislation alone is not enough to address the issue of disparate treatment in pay for working women. There is also a need to create programs that educate employers, governments and society in general about the systemic discrimination based on negative stereotypes of women's role in society. "In order for things to change, we have to collectively acknowledge that there is an issue, that is worth fixing and that it won't change unless businesses and individuals take intentional action."⁴⁹²

Chapter 3 of this thesis will now present and compare the enacted legislation by Colombia and Canada to address the issues caused by discrimination against working women in Canada and Colombia.

⁴⁹⁰ Baer, *supra* note 59 at 316.; Scales, *supra* note 59 at 1381.

⁴⁹¹ Budlender, *supra* note 242 at 34,38. *Beijing Declaration*, *supra* note 90 at 71.

⁴⁹² Jenn Hubley Luckwaldt & Lydia Frank, "#EqualPayDay: 10 Quotes to Inspire You to Fight for Pay Equity", (12 April 2016), online: *Career News* <<http://www.payscale.com/career-news/2016/04/equal-pay-day-quotes>>.

CHAPTER 3

3. DISCRIMINATION AGAINST WOMEN IN THE WORKPLACE

Since the end of the 19th century, women have been searching to exercise their right to work and to earn a living. They do this by joining the paid workforce for various reasons, including to support themselves and their families, and to develop their careers. In this search, they have encountered numerous barriers such as a discrimination, unfair wages, and harassment. However, these barriers have not stopped them from fighting for the recognition of equality rights in and out of the workplace. The battle for equality has not been an easy one, and has seen both successes and disappointments; nonetheless the perseverance of women in their search persists today. This chapter will present and compare the existing legal tools in Colombia and Canada enacted to eliminate discrimination against women in the workplace. It will begin by setting out the international treaties and instruments created by the International Labour Organization (ILO) and the United Nations (UN), with the purpose of eliminating discrimination against women in the work environment. These international rules and regulations will provide a common ground of comparison between Canada and Colombia. They will also provide common social standards and goals for the two countries. The chapter will then explore the legal framework enacted by Canada to protect women from discrimination in the work environment, followed by the legal framework enacted in Colombia to eliminate discrimination for working women. It will conclude with reflections and comparisons on the current state of the matter of discrimination against women at work, and how successful Canada and Colombia have been in achieving the goals as established mainly by the ILO and the UN.

3.1 International Standards and Efforts to Protect Women from Discrimination in the Work Environment

The international community has recognized the important role of women's work in the communities in which they live, and has also recognized that acts of discrimination

against women are acts against their basic human rights.⁴⁹³ As such, the UN and the ILO have crafted treaties, non-binding agreements, and programs with the purpose of achieving gender equality and eliminating discrimination against women who join the paid labour segment. Within the human rights treaty regime, the main treaties addressing non-discrimination in employment are: the International Covenant on Economic, Social and Cultural Rights (ICESCR);⁴⁹⁴ the International Covenant on Civil and Political Rights (ICCPR);⁴⁹⁵ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);⁴⁹⁶ the Optional Protocol to CEDAW;⁴⁹⁷ and the ILO's Conventions No. 100, concerning equal pay for work of equal value;⁴⁹⁸ and No. 111, concerning discrimination in respect to employment and occupation;⁴⁹⁹ and its accompanying recommendation No. 111.⁵⁰⁰ In addition, while not a treaty and therefore non-binding as a document, it is important to also consider the Universal Declaration of Human Rights (UDHR),⁵⁰¹ as it is widely viewed as expressing binding customary international law.

Articles 6 and 7 of the ICESCR recognize the right to work, the opportunity to earn a living and the right to just and favorable work conditions. They are subject to articles 2 and 3, which are interrelated, and state that the ICESCR rights must be applied without discrimination on the basis of, *inter alia*, sex.⁵⁰² In its General Comment No. 16, the

⁴⁹³ United Nations, ed, *Women's rights are human rights* (New York; Geneva: United Nations, 2014) at 1,3,4.

⁴⁹⁴ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS, CAN TS 1976 No.46. (Colombia ratified the ICESCR on December 21, 1966 and Canada accessed it on 19 May 1976.)

⁴⁹⁵ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 172 [ICCPR]. (Canada accessed to the covenant on 19 May 1976 after filing three objections to the reservations made by Pakistan, Maldives, and Bahrain. Colombia ratified the ICCPR on 29 October 1969)

⁴⁹⁶ CEDAW, *supra* note 11.

⁴⁹⁷ *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, GA res. 54/4, annex, 54 UN GAOR Supp. (No. 49) at 5, UN Doc. A/54/49 (Vol. I); 2131 UNTS 83, 15 October 1999 [Optional Protocol to CEDAW]. (Canada accessed it on 18 October 2002 and Colombia on 29 January 2007)

⁴⁹⁸ ILO Convention No.100, *supra* note 459.

⁴⁹⁹ *Convention (No.111) concerning discrimination in respect of employment and occupation*, 25 June 1958, 362 UNTS 31 (ILO) [ILO Convention No. 111].

⁵⁰⁰ *Recommendation (No. 111) concerning discrimination in respect of employment and occupation*, 25 June 1958, 42nd ILC session [ILO Recommendation No. 111].

⁵⁰¹ *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No13, UN Doc A/810 (1948), 10 December 1948 [UDHR].

⁵⁰² *General Comment No. 16. Article 3: the equal right of men and women to the enjoyment of all economic, social and cultural rights*, CESCR, 13 May 2005, 34th Sess [General Comment N. 16. Article 3] at 23,24.

Committee of the ESCR explained that “the principle of non-discrimination is corollary of the principle of equality” and that gender is a factor that affects the full enjoyment of fundamental rights between men and women.⁵⁰³ In the same document, the Committee further explains that article 6 of the Covenant requires “State parties to safeguard the right of everyone to the opportunity to gain a living by work which is freely chosen or accepted and to take the necessary steps to achieve the full realization of this right;”⁵⁰⁴ and that the implementation of article 6 with relation to article 3, will require, *inter alia*, governments to ensure that women and men have equal access to work and training opportunities.⁵⁰⁵ The General Comment further explains that the implementation of article 7 of the Covenant, with respect to article 3, will too require governments to ensure that everyone has the right to enjoy fair and favourable conditions at work. These include the principle of equal pay for work of equal value, the right of equality of opportunities and the protection of the rights of workers with family responsibilities.⁵⁰⁶ As such, State parties should change and implement legislation that will allow the government to monitor and ensure compliance.⁵⁰⁷

The CEDAW was enacted in 1979 by the United Nations General Assembly with the purpose of eliminating discrimination against, and achieving equality for, women. Recognizing that women’s rights are human rights, and as such they share the same general principles (universality, inalienability equality, non-discrimination, indivisibility, interdependence and interrelatedness), the Convention created an international legal structure to protect women and girls from discrimination.⁵⁰⁸ The obligations contained in CEDAW require State parties to enact appropriate measures at domestic level to prohibit all forms of discrimination against women. This obligation provides State parties with flexibility in determining the best way to achieve CEDAW’s goals within their own legal systems; however, the State party should be able to justify the appropriateness of the

⁵⁰³ *Ibid* at 10.

⁵⁰⁴ *Ibid* at 23.

⁵⁰⁵ *General Comment N. 16. Article 3*, *supra* note 502.

⁵⁰⁶ *Ibid* at 24.

⁵⁰⁷ *General Comment N. 16. Article 3*, *supra* note 502.

⁵⁰⁸ Christine Chinkin & Marsha A Freeman, “Introduction” in *UN Conv Elimin Forms Discrim Women - Comment* (New York: Oxford University Press Inc., 2012) at 6.

tools it has chosen and demonstrate results.⁵⁰⁹ These obligations of States are contained in article 2 of the Convention. The article states:

States parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.⁵¹⁰

Overall article 2 of CEDAW, establishes obligations for State parties, to modify their own domestic legal systems with the purpose of eliminating discrimination against women in all its forms. These changes begin with incorporating the principle of equality into their national constitution, followed by the incorporation of legislative tools to protect the rights of women, as well as to impose sanctions in cases of discrimination. Article 2 also commends State parties to eliminate laws, practices and customs that embody discrimination against women and girls.

⁵⁰⁹ *Ibid* at 9.

⁵¹⁰ CEDAW, *supra* note 236 at art 2.

With respect to discrimination against women in employment, article 11 of CEDAW requires State parties to implement all measures necessary to ensure that women and men enjoy freedom to choose their work and equality of opportunity, remuneration, conditions of employment, benefits, access to social security, and the rights to work in a healthy and safe environment. Furthermore, article 11(2) refers to the prohibition of discrimination against working women on the grounds of marriage and maternity.⁵¹¹

Apart from adopting treaties, the UN has taken action through non-binding means. Four important world gatherings that considered the issue of discrimination against women in the world of work were: the 1975 World Conference of the International Women's Year, celebrated in Mexico; the 1980 World Conference of the United Nations' Decade of Women in Copenhagen; the 1985 World Conference to Review and Appraise the Achievements of the UN Decade for women celebrated in Nairobi; and the 1995 Beijing World Conference on Women. The 1975 Mexico City World Declaration and Plan of Action for the implementation of the objectives of the international women's year recognized that discrimination against women is incompatible with human dignity, the welfare of the family and society, thus the wellbeing of women is an area that should concern society as a whole.⁵¹² With respect to employment, it recommended the formulation and implementation of development models "that will promote the participation and advancement of women in all fields of work and provide them with equal educational opportunities and such services as would facilitate house work;"⁵¹³ calling upon states to introduce domestic changes with the purpose of improving women's economic, political and social situation.⁵¹⁴ Canada and Colombia participated in the conference. Colombia stressed the need to focus on the special needs of women living in developing countries in areas such as education, employment, and housing, particularly for women living in rural areas and low-income women living in urban areas.⁵¹⁵

⁵¹¹ *Ibid* at art 11.

⁵¹² UNOR, *Report of the World Conference of the International Women's Year*, Doc/E/Conf.66/34 (1976) at Ch 1.

⁵¹³ *Ibid* at 20.

⁵¹⁴ *Ibid* at 37,38,39.

⁵¹⁵ *Ibid* at B (20).

The outcome document of the UN World Conference on Women, the 1995 Beijing Declaration and Platform for Action, addresses non-discrimination in the workplace. Indeed, the declaration recognized the disadvantageous position of women in employment:

Women often have no choice but to take employment that lacks long-term job security or involves dangerous working conditions, to work in unprotected home-based production or to be unemployed. Many women enter the labour market in under-remunerated and undervalued jobs, seeking to improve their household income; others decide to migrate for the same purpose. Without any reduction in their other responsibilities, this has increased the total burden of work for women.⁵¹⁶

The declaration crafted its strategic objective F.5 for the elimination of occupational segregation and all forms of discrimination and called on governments to implement changes into their domestic legal systems as well as to promote programs to eliminate discrimination against women.⁵¹⁷

Within the ILO system, the main treaty directly addressing non-discrimination in the workplace is the Discrimination (Employment and Occupation) Convention No. 111,⁵¹⁸ together with its Discrimination (Employment and Occupation) Recommendation No. 111.⁵¹⁹ This Convention was ratified by Canada in 1964 and by Colombia in 1969 and it obligates State parties to “promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.”⁵²⁰

Despite efforts to meet the goals established by international agreements such as CEDAW, Canada and Colombia have not eliminated discrimination against women in the workplace. This chapter will explain the domestic legal structure enacted by both Canada and Colombia to eliminate discrimination against working women. The chapter will

⁵¹⁶ *Beijing Declaration and Platform for Action*, UNOR, UN Doc A/CONF.177/20, 1995 [*Beijing Declaration*] at Ch 2 (19).

⁵¹⁷ *Ibid* at 76.

⁵¹⁸ *Convention (No.111) concerning discrimination in respect of employment and occupation*, 25 June, 1958, 5181 UNTS 362.

⁵¹⁹ *Recommendation (No. 111) concerning discrimination in respect of employment and occupation*, ILO Recommendation of 25 June, 1958, 42nd Sess.

⁵²⁰ *ILO Convention No. 111*, *supra* note 499 at art 2.

conclude with reflections and conclusions on the successes and failures of the domestic efforts to achieve international standards on non-discrimination against women.

3.2 Legal framework enacted in Canada to protect women from gender discrimination and harassment in the work environment

This section will review the legal system enacted in Canada to effectively protect the rights of working women against discrimination, including harassment, in the work environment. This section will start by providing a brief historical context to the issue of equality for women in Canada under the lens of the public/private divide theory; followed by a reference to the relevant laws and important Supreme Court decisions that have shaped the legal framework to eliminate discrimination against women when they join the paid workforce. This part will conclude with a brief reflection about the current position of Canada regarding the standards established by international organizations such as the United Nations and the International Labour Organization.

Gender-based discrimination is a systemic and recurring issue in women's history and unfortunately Canada is not the exception. Canadian women have long performed unpaid and undervalued domestic work, taking care of their families and homes. The lives of Canadian women – like women everywhere - are marked by an ideological organizational structure referred to as the private/public divide: “the public/private divide denotes the ideological division of life into apparently opposing spheres of public and private activities and public and private responsibilities.”⁵²¹ Childcare and domestic work, usually performed by women, belong to the private sphere of families and as such they often lack monetary remuneration and are not regulated by labour and employment legislation. Indeed, while men participate in greater numbers in the paid workforce, hence dominating the public sphere;⁵²² women have the tendency to assume (but not dominate in the sense of exercising authority, as men exercise considerable power over women and

⁵²¹ Susan B Boyd, “Can Law Challenge the Public/Private Divide? Women, Work and Family” (1996) 15 Windsor Yearb Access Justice 161.

⁵²² *Ibid* at 163.

children within the family⁵²³) the responsibilities of childcare and domestic work in the private sphere.⁵²⁴

Deeply-rooted social beliefs and gender stereotypes are elements that are present in the private sphere and that foster systemic discrimination which is difficult to eliminate. Indeed, the gendered work aspect of the public/private divide reproduces itself within each of the two spheres, with women performing “women’s work” that is undervalued in each sphere.⁵²⁵ When gender stereotypes find their way into the public sphere of the paid work environment, they foster a male-created environment that is prone to discrimination and harassment against working women, causing them to encounter more barriers to entry into the labour force. Although men now participate more in child and domestic responsibilities, the burden of “double day” of domestic labour and labour force is accepted primarily by women,⁵²⁶ creating an added barrier for women to access equal opportunities at work. As such, women are negotiating the public/private divide of work and family more than men, and this issue tampers with the ability of achieving equality in the public sphere of paid work for women.⁵²⁷ This issue continues to be relevant today as reported by Statistics Canada. In 2010, Canadian women spent an average of 50.1 hours per week on child-care activities; more than double the average of men, which was 24.4 hours per week.⁵²⁸ In the same year, women also spent more hours on unpaid domestic activities than men. Indeed, women reported spending an average of 13.8 hours per week on domestic work, more than one and a half times than men, whom reported spending an average of 8.3 hours per week on these activities.⁵²⁹

The labour environment in Canada has been constantly changing for the past century. In the late 1960s, Canadian women’s groups advocated for the recognition of equality rights. As a result, on February 16, 1967, the federal government organized the Royal

⁵²³ *Ibid* at 164.

⁵²⁴ *Ibid* at 162.

⁵²⁵ *Ibid* at 166.

⁵²⁶ *Ibid* at 171.

⁵²⁷ *Ibid* at 173.

⁵²⁸ Ann Milan, Leslie-Ann Keown & Covadonga Robles Urquijo, *Families, Living Arrangements and Unpaid Work*, Women in Canada: A Gender-based Statistical Report 89–503–X (Statistics Canada, 2011) at table 6.

⁵²⁹ *Ibid* at table 7.

Commission on the Status of Women “to ensure for women equal opportunities with men in all aspects of Canadian society”.⁵³⁰ Chaired by CBC broadcaster Florence Bird, the Commission examined the reality of women in Canada in the light of the principle that “all human beings are born free and equal in dignity and rights” as established in the Universal Declaration of Human Rights.⁵³¹ The resulting report made 167 recommendations for greater equality of women, including guaranteed income for single mothers, a national childcare system, the inclusion of disabled women, full equality in education, employment, electoral politics and equal pay.⁵³² The report marked an important change in Canada’s history on the recognition of women’s rights: “[i]t turned Canada in a new direction, launched hundreds of parliamentary initiatives, spurred the development of grassroots feminist organizations and stimulated conversation about women’s rights that still echoes ever more faintly today”.⁵³³ Since then, the development and recognition of equality rights for women has been a slow, sometimes unfair and painful process, even though the participation of women in the workforce is continuously emerging.⁵³⁴

With the purpose of protecting women’s rights, antidiscrimination legislation has been enacted in Canada extending protections against various forms of discrimination based on gender identity, gender expression and transgender status.⁵³⁵ The following subsections will analyze legislation and case law enacted in Canada to eliminate discrimination against women in the workplace.

⁵³⁰ Michelle Landsberg, “Blueprint for Equality Launched”, *Herizons Mag Inc* (Spring 2015) 45.

⁵³¹ *Ibid.*

⁵³² *Ibid.*

⁵³³ *Ibid.*

⁵³⁴ Per ILOSTAT data in 1990 the labour force participation of adult females (15+) in Canada was of 58% and it increased to 61% participation in 2016. Online: The World Bank
<<http://data.worldbank.org/indicator/SL.TLF.CACT.FE.ZS?locations=CA>>

⁵³⁵ *Canadian Human Rights Act, RSC 1985, c H-6* [*Canadian Human Rights Act, RSC 1985, c H-6*].

3.2.1 Legislative protections against discrimination for working women in Canada

Canada has implemented legislative changes with the aim of eliminating discrimination in all of its forms against women in Canadian workplaces. Changes in human rights legislation prohibiting discrimination in employment and the adoption of employment equity laws, equal pay legislation, pay equity, maternity and parental leave legislation⁵³⁶ are good examples of legislation enacted to achieve the goal of equality.

In Canada, employers must ensure that workplaces are free of discrimination, including gender discrimination.⁵³⁷ Based on the federal “peace, order and good government” power in section 91 of the Constitution,⁵³⁸ and the provincial power over “property and civil rights” in section 92, anti-discrimination legislation has been enacted by both federal and provincial governments.⁵³⁹ Although federal anti-discrimination legislation is slightly different than provincial legislation, gender-based discrimination (for example, on the basis of sex or pregnancy) directed against women is prohibited by both federal and provincial legislatures in Canada.⁵⁴⁰

At a federal level, workers are protected from discrimination mainly by three pieces of legislation: the Canadian Charter of Rights and Freedoms Section 15(1), which recognises that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular,

⁵³⁶ Boyd, *supra* note 521 at 169,170.

⁵³⁷ *Canadian Human Rights Act*, RSC 1985, c H-6, *supra* note 535..

⁵³⁸ *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c 11 [*The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c 11].

⁵³⁹ Nancy Holmes, “Human Rights Legislation and the Charter” in Mini Review (Library of Parliament. Parliamentary Research Branch, 1992 revised 1997) 1 at 1 available at <http://publications.gc.ca/pub?id=9.561609&sl=0>

⁵⁴⁰ *Alberta Human Rights Act*, RSA 2000, c A-25.5 [*Alberta Human Rights Act*, RSA 2000, c A-25.5] at Preamble; *Human Rights Act*, RSY 2002, c 116 [*Human Rights Act*, RSY 2002, c 116] at 7; *Human Rights Code*, RSBC 1996, c 210 [*Human Rights Code*, RSBC 1996, c 210] at s 13 (1)(2)(3)(4); *Human Rights Code*, RSO 1990, c H.19 [*Human Rights Code*, RSO 1990, c H.19] at 5(1); *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1 [*The Saskatchewan Human Rights Code*, SS 1979, c S-24.1] at s 16.; *Charter of Human Rights and Freedoms*, CQLR c C-12 [*Charter of Human Rights and Freedoms*, CQLR c C-12] at s 10; *Human Rights Act*, 2010, SNL 2010, c H-13.1 [*Human Rights Act*, 2010, SNL 2010, c H-13.1] at p II s 2 (1); *Human Rights Act*, RSNB 2011, c 171 [*Human Rights Act*, RSNB 2011, c 171] at s 2.1; *Human Rights Act*, RSNS 1989, c 214 [*Human Rights Act*, RSNS 1989, c 214] at p I s 5; *Human Rights Act*, RSPEI 1988, c H-12 [*Human Rights Act*, RSPEI 1988, c H-12] at p I s 2(1); *Human Rights Act*, SNu 2003, c 12 [*Human Rights Act*, SNu 2003, c 12] at p II s 7(1); *Human Rights Act*, SNWT 2002, c 18 [*Human Rights Act*, SNWT 2002, c 18] at pII s 5(1).

without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability;⁵⁴¹ the Canadian Employment Equity Act, enacted to increase the employment participation of members of protected groups, by requesting employers to increase employment opportunities, eliminate barriers of employment, and provide reasonable accommodations, to women, people with disabilities, Aboriginal peoples and visible minorities in labour activities;⁵⁴² and the Canadian Human Rights Act (CHRA), that promotes equal opportunity and prohibits discrimination based on protected grounds such as sex, ethnicity, disability or religion.⁵⁴³ The CHRA also regulates the Canadian Human Rights Commission, to investigate complaints regarding discriminatory practices and to create and promote information programs to increase the public's knowledge of human rights,⁵⁴⁴ and the Canadian Human Rights Tribunal, to decide the cases.⁵⁴⁵

In Canada, anti-discrimination legislation is also enacted at a provincial level. For example, the Ontario Human Rights Code,⁵⁴⁶ enacted in 1962, protects individuals from discrimination based on protected grounds, including sex, and in protected social areas, such as accommodation (housing); contracts; employment; goods, services and facilities; and membership in unions, trade and/or professional associations. Although there are minor differences between provinces, each statute prohibits discrimination based on sex in the context of employment.⁵⁴⁷

As explained by Susan Boyd, federal and provincial legislation alone is not enough to eliminate acts of discrimination against women in the workplace.⁵⁴⁸ Legislation is, however, necessary to initiate awareness of issues that represent a breach of women's human rights.⁵⁴⁹ Legislation is also necessary to provide women with legal tools to seek

⁵⁴¹ *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11* [*The Constitution Act 1982*] at s 15 (1).

⁵⁴² *Employment Equity Act, SC 1995, c 44* [*Employment Equity Act, SC 1995, c 44*] at c 35(2), c 44. at c 35, s 2.

⁵⁴³ *Canadian Human Rights Act, RSC 1985, c H-6, supra* note 535. at c (h) to (v), s 5 (1).

⁵⁴⁴ *Ibid* at s 27.1(a).

⁵⁴⁵ *Ibid* at s 48.1.

⁵⁴⁶ *Human Rights Code, RSO 1990, c H.19, supra* note 540.

⁵⁴⁷ See *supra* note 501

⁵⁴⁸ Boyd, *supra* note 521 at 185.

⁵⁴⁹ *Ibid* at 182.

for remedies in cases where their rights are violated. Furthermore, the achievement of equality requires that governments address the structural nature of discrimination rooted in patriarchy and socio-cultural patterns of conduct, as well as the elimination and transformation of society's gender relations.⁵⁵⁰

The interpretation of what represents discrimination based on sex has been developed primarily by Supreme Court of Canada jurisprudence, which has changed the legal understanding, implementation and remedies in cases involving a breach of women's rights in the workplace. The next part of this chapter will explain these Supreme Court of Canada decisions.

3.2.2 Litigation in Canada: Supreme Court Decisions

The international responsibility of Canada to eliminate and address issues of discrimination against women in the workplace includes the implementation of legal tools to protect, support and address acts of discrimination against women.⁵⁵¹ This chapter referred previously to the enacted legislation to prevent and protect women from discrimination in the workplace. The following subsection will explain the actions taken by Canadian courts to address and provide remedies to women who have been victims of discrimination at their places of work.

The Supreme Court of Canada's interpretation of the application of equality has changed over the years. Initially the Court interpreted cases of discrimination by examining whether there was a breach of rights before and under the law. For example, in the controversial case of *Canada (AG) v Lavell*,⁵⁵² two women - Lavell and Bedard - alleged that section 12(1)(b) of the Indian Act was discriminatory under the Canada Bill of Rights because it deprived women of their Indian status for marrying a non-Indian, but did not apply in the same way to Indian men.⁵⁵³ In this case, the Supreme Court decided

⁵⁵⁰ Christine Chinkin & Marsha A. Freeman, *supra* note 508 at 9.

⁵⁵¹ A Byrnes & E Bath, "Violence against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women--Recent Developments" (2008) 8:3 Hum Rights Law Rev 517.

⁵⁵² *Attorney General of Canada v Lavell*, 1973 C (available on <http://canlii.ca/t/1xv15>).

⁵⁵³ *Ibid* at 3.

that Section 12(1) (b) of the Indian Act⁵⁵⁴ did not violate the respondent's rights to equality "before the law", under section 1(b) of the Canadian Bill of Rights.⁵⁵⁵

Later, in 1979, the Court's decision in *Bliss*⁵⁵⁶ stated that, based on the Canadian Bill of Rights,⁵⁵⁷ women were not entitled to certain benefits denied to them in the Unemployment Insurance Act during pregnancy. In this case, Ms. Stella Bliss left work four days before giving birth. As per the wording in the legislation, she was not entitled to receive full benefits under section 30 of the Unemployment Insurance Act and instead was subject to section 46 of the same act, which denied her benefits for six weeks after childbirth.⁵⁵⁸ She challenged section 46 of the Act as a violation of section 1(b) of the Canadian Bill of Rights.⁵⁵⁹ The Supreme Court of Canada found that this was not discrimination "before the law", as the law applied equally to all pregnant people: "[i]f section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant, not because they are female;"⁵⁶⁰ furthermore the Court added that, "any inequality between sexes in this area is not created by legislation but by nature."⁵⁶¹ This final affirmation was a misleading legal interpretation of the differences approach, using the natural differences between men and women as an element to support discrimination instead of celebrating the differences to achieve equality.⁵⁶² These two cases showed the clear existence of a gap in the Bill of Rights that led to a lack of protection of equality rights for women,⁵⁶³ hence influencing the drafting of Section 15 of the Canadian Charter of Rights and Freedoms, to ensure that women have their equality rights protected before and under the

⁵⁵⁴ Indian Act, R.S.C. 1970, c. 1-6. (Section 12(1) (b) of the Indian Act deprived Indian women of their status for marrying a non-Indian, but did not apply the same treatment to Indian men who married a non-Indian.)

⁵⁵⁵ *Lavell*, *supra* note 552 at 1373.

⁵⁵⁶ *Bliss v Attorney General of Canada*, [1979] 25 CanLII (1 SCR 183) (1978 CanLII 25 (SCC)) (available on <https://www.canlii.org/en/ca/scc/doc/1978/1978canlii25/1978canlii25.pdf>).

⁵⁵⁷ Canadian Bill of Rights, SC 1960, c 44.

⁵⁵⁸ *Bliss*, *supra* note 556.

⁵⁵⁹ *Supra* note 43

⁵⁶⁰ *Bliss*, *supra* note 556.

⁵⁶¹ *Ibid* at 190.

⁵⁶² Ann C Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986) 95:7 Yale Law J 1373 at 1375.

⁵⁶³ Ruth Roach Pierson et al, *Canadian Women's Issues* (Toronto, Canada: James & Company, Publishers, 1993) at 329.

law.⁵⁶⁴ These distinctions have not been used since 1985, when section 15 of the Charter became operative.⁵⁶⁵

The 1989 judgment in *Brooks v. Canada Safeway Ltd.*⁵⁶⁶ overturned the decision in *Bliss*. The case involved three pregnant employees who lost wage-loss benefits offered by the employer because of a workplace group benefits plan that discriminated against pregnant women. In this case, the Supreme Court of Canada decided that pregnancy cannot be separated from women and that discrimination based on pregnancy is a form of sex discrimination because it is a biological fact that only women have the capacity to become pregnant.⁵⁶⁷ The Court also stated that Safeway Ltd.'s benefits plan was discriminatory because it imposed unfair disadvantages on pregnant women and – importantly – noted that the intent to discriminate is not an element of discrimination.⁵⁶⁸

The development of sex discrimination law in Canada was expedited with the 1987 decision by the Supreme Court of Canada in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission) and Action Travail des Femmes*.⁵⁶⁹ As explained in detail in Chapter 2 of this thesis, this decision upheld a human rights tribunal finding that the employer's recruitment, hiring and promotion practices had amounted to systemic discrimination by creating barriers for women to access manual work occupations different from those traditionally held by women.⁵⁷⁰ The Supreme Court also recognized that the employer needed to create and implement an employment equity plan that would remove barriers for the development, recruitment and promotion of women to different jobs within the company.

⁵⁶⁴ Native Women's Association of Canada, *Section 1.2 of the Canadian Human Rights Act: Balancing Collective and the Principle of Gender Equality* (Canadian Human Rights Commission, 2010) at 3.

⁵⁶⁵ Pierson et al, *supra* note 563.

⁵⁶⁶ *Brooks v Canada Safeway LTD*, [1989] 96 CanLII (1 SCR 183) (1978 CanLII 25 (SCC)) (available on <https://www.canlii.org/en/ca/scc/doc/1989/1989canlii96/1989canlii96.pdf>).

⁵⁶⁷ *Ibid.* at par 2.

⁵⁶⁸ *Ibid.* at par 3.

⁵⁶⁹ *CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 (C) (available on <http://canlii.ca/t/11pg8>).

⁵⁷⁰ *Ibid.*; *Action Travail des Femmes v Canadian National Railway*, 1984 C (available on <http://canlii.ca/t/1g8ks>).

Later in 1999, in *B.C. (Public Service Employee Relations Commission) v. B.C. Government Service Employees' Union (Meiorin)*,⁵⁷¹ Tawney Meiorin was an employee with the British Columbia Ministry of Forests. After three year of employment as a firefighter, the government adopted a series of fitness tests necessary to ensure safety and for the continuation of employment.⁵⁷² Ms. Meiorin could past all the tests except for one and thus her employment was terminated.⁵⁷³ After analysis of the facts, the Supreme Court established that the Government's Bona Fide Occupational Fitness Tests and Standards for British Columbia Forest Service Wildland Firefighters were *prima facie* discriminatory to women.⁵⁷⁴ With this decision. the Supreme Court also created a unified test to determine whether a violation of human rights legislation can be justified as a bona fide occupational requirement (BFOR).⁵⁷⁵ The examination known as the "Meiorin Test," requires an employer to demonstrate that: a) the standard was adopted for a purpose rationally connected to the performance of the job; b) the employer honestly believes that the standard is necessary to fulfill a legitimate, work-related purpose; and c) the standard is reasonably necessary for the accomplishment of the legitimate, work-related purpose, hence must probe that it is impossible to accommodate workers without undue hardship to the employer.⁵⁷⁶ In this case, the Court shifted the burden of proof to the government to demonstrate that the aerobic requirement represented a BFOR and was absolutely necessary to ensure the safety of firefighters.⁵⁷⁷ The Government failed to probe that the standard was necessary to ensure safety, and the aerobic test was considered a barrier for female employees to access employment and promotion.⁵⁷⁸

This decision represented an important advancement in equality for Canadian women in the workplace; before this decision, human rights disputes could be decided using one of two methods: as direct discrimination as established in *Human Rights Commission v.*

⁵⁷¹*British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 (C) (available on <http://canlii.ca/t/1fqk1>).

⁵⁷²*Ibid* at 10.

⁵⁷³*Ibid* at 12.

⁵⁷⁴*Ibid* at 17.

⁵⁷⁵*Ibid* at 33.

⁵⁷⁶*Ibid* at 32.

⁵⁷⁷*Ibid* at 35.

⁵⁷⁸ *Ibid* at 38.

Borough of Etobicoke,⁵⁷⁹ or as adverse effects discrimination as per the judgment in *O'Malley v. Simpson-Sears*.⁵⁸⁰ In *Meiorin*, the court explained that such a bifurcated analysis was artificially established and inadequate to effectively protect equality rights.⁵⁸¹

The Supreme Court of Canada has further developed the rights of working women by examining a specific form of discrimination: workplace harassment. The next subsection examines this jurisprudence.

3.2.3.1 The issue of workplace harassment as a form of discrimination against working women in Canada

Workplace harassment on sex grounds encompasses a broad group of acts of discrimination, abuse and violation that have an emotional and/or physical effect on an employee.⁵⁸² This chapter has covered the subject of discrimination and the legislation and litigation that form the legal system enacted in Canada to eliminate it. This part of the chapter will refer briefly to sexual harassment as another form of discrimination that impacts women in the workplace. Even though men can be victims of sexual harassment, it is women whom are more often affected by sexual harassment.⁵⁸³ The Canadian Human Rights Commission notes that the definition of harassment must be viewed in an overall context, it defines harassment as a form of discrimination that involves physical or verbal behaviour that offends or humiliates an individual.⁵⁸⁴ It includes behaviours such as: (a) unwelcome remarks or jokes about an individual's race, religion, sex,

⁵⁷⁹ *Ontario Human Rights Commission v Etobicoke*, [1982] 1 SCR 202 (C) (available on <http://canlii.ca/t/1lpbq>).

⁵⁸⁰ *Ont Human Rights Comm v Simpsons-Sears*, [1985] 2 SCR 536 (C) (available on <http://canlii.ca/t/1ftxz>).

⁵⁸¹ *Meiorin*, *supra* note 571. at par 26.

⁵⁸² *Janzen v Platy Enterprises LTD*, [1989] CanLII (SCR) (available on <http://www.canlii.org/en/ca/scc/doc/1989/1989canlii97/1989canlii97.pdf>) at 1253.

⁵⁸³ *Ibid* at 1284; Judith A Baer, "Feminist theory and the law" (2009) Oxf Handb Polit Sci, online: <<http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199604456.001.0001/oxfordhb-9780199604456-e-016>> at 11.

⁵⁸⁴ Canadian Human Rights Commission, "What is harassment?", (9 January 2013), online: *Can Hum Rights Comm* <<http://www.chrc-ccdp.ca/eng/content/what-harassment>>.

disability or any other of the eleven grounds of discrimination;⁵⁸⁵ (b) threats or intimidation; (c) unwelcome physical contact.⁵⁸⁶

The Supreme Court of Canada has broadly defined sexual harassment in the workplace as: “unwelcome conduct of sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment”⁵⁸⁷ and has placed it within the human rights jurisdiction, mainly with two key decisions: *Robichaud v. Canada Treasury Board*,⁵⁸⁸ and *Janzen v. Platy Enterprises Ltd.*⁵⁸⁹

In *Robichaud v. Canada Treasury Board*,⁵⁹⁰ the Court found that, under the Canadian Human Rights Act, a corporation can be liable for the unauthorized discriminatory acts of its employees in the course of their employment, including sexual harassment. The Court stated that this liability is purely statutory, though it serves the purpose somewhat similar to that of vicarious liability in tort, by placing responsibility for an organization on those who control it and are in position to prevent or take effective remedial action to remove undesirable conditions.⁵⁹¹ In a subsequent ruling two years later in *Janzen*, the Supreme Court undertook the task of deciding whether sexual harassment in the workplace is a form of discrimination based on sex. It found, in a unanimous decision, that sexual harassment is a form of discrimination that attacks the dignity and self-respect of the victim as an employee and as a human being.⁵⁹² Chief Justice Dickson stated that discrimination does not require uniform treatment of all members of a particular group: discrimination on the basis of sex occurs where there is a “practice or attitude which had the effect of limiting the conditions of employment of, or the employment opportunities available to employees on the basis of a characteristic related to gender”.⁵⁹³

⁵⁸⁵ *Canadian Human Rights Act, RSC 1985, c H-6, supra* note 535 at s 3(1). (race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, a conviction for which a pardon had been granted or a record suspended).

⁵⁸⁶ Canadian Human Rights Commission, *supra* note 584.

⁵⁸⁷ *Janzen, supra* note 582 at 1284.

⁵⁸⁸ *Robichaud v Canada (Treasury Board)*, [1987] 2 SCR 84 (C) (available on <http://canlii.ca/t/1ftl5>).

⁵⁸⁹ *Janzen, supra* note 582.

⁵⁹⁰ *Robichaud, supra* note 588 at par 12.

⁵⁹¹ *Ibid.*

⁵⁹² *Janzen, supra* note 582.

⁵⁹³ *Ibid* at 1280.

While sexual harassment is considered by the Supreme Court of Canada as a form of discrimination based on sex and therefore a human rights violation, remedy for sexual harassment can also be sought through civil litigation, though this form of remedy is currently not well developed. Dr. Gillian Demeyere explains that the broad definition of sexual harassment encompasses acts that can be compared to existing torts such as assault, battery, defamation, and intentional infliction of mental distress.⁵⁹⁴ She also explains that women might prefer to seek remedy for damages caused by sexual harassment by using civil litigation, but that a new tort of sexual harassment is needed in order to ensure that victims can find adequate relief and secure common law damages for their losses and injuries.⁵⁹⁵

Overall, sexual harassment represents a clear form of harm, damaging the dignity and self-esteem of victims with the purpose of controlling them and/or limiting their scope of action and opportunities.⁵⁹⁶ Despite the enactment of legislation and the recognition and remedies crafted by the Supreme Court in cases such as *Janzen* and *Robichaud*, sexual harassment continues to ail Canadian workplaces. This issue has also received international attention, as mentioned by CEDAW Committee in the following terms:

The Committee is concerned about the slow progress made in the field of employment and, more specifically, about:

d) The prevalence of sexual harassment in the workplace, especially in male-dominated sectors, such as the policing and military environments, and the lack of effective measures to deal with such harassment and to inform women of their rights.⁵⁹⁷

Indeed, the RCMP has recently been the focus of investigations due to sexual harassment, bullying and discrimination cases against women. In a class action that consolidated claims from Janet Merlo (BC 2012) and Linda Davidson (ON 2015),⁵⁹⁸ Ms. Merlo and Ms. Davidson claimed to have been victims of several acts of gender-based discrimination, bullying and harassment within the RCMP. The case was settled

⁵⁹⁴ Gillian P Demeyere, *Recovery in tort for workplace sexual harassment, problems and prospects* National Library of Canada= Bibliothèque nationale du Canada, 2000) [unpublished] at 17.

⁵⁹⁵ *Ibid* at 9.

⁵⁹⁶ Christine A Littleton & Catharine A MacKinnon, "Feminist Jurisprudence: The Difference Method Makes" (1989) 41:3 Stanford Law Rev 751 at 769,770.

⁵⁹⁷ CEDAW *Concluding Observations on 8th and 9th reports of Canada*, *supra* note 20 at 14.

⁵⁹⁸ *Merlo v Canada*, 2017 FC 51 (available on <http://canlii.ca/t/gx010>).

out-of-court on October 6, 2016. The settlement granted financial remedy to victims and an obligation of the RCMP to implement changes in its work environment to effectively eliminate future cases of gender-based harassment, bullying and discrimination, as publicly announced by the Commissioner of the Royal Canadian Mounted Police.⁵⁹⁹ However, a 2017 review of the issue of workplace harassment in the RCMP showed that the institution has not implemented comprehensive measures to eliminate harassment against women.⁶⁰⁰ The report made eight recommendations, including the revision of policies and cultural change for the RCMP to effectively eliminate the issue of harassment, bullying and abuse of authority. Similar issues are found in the Canadian military, as established in an external review process by Justice Marie Deschamps.⁶⁰¹ These cases and reports illustrate that discrimination in the workplace (especially male-dominated workplaces) is still a significant issue for Canadian women.

3.2.3 Summary

Canada has enacted extensive non-discrimination legislation and its highest court has considered the matter of non-discrimination in the workplace in its jurisprudence. However, unfortunately discrimination directed against women still exists in Canadian workplaces. Legislation must be accompanied by a change in the discriminatory practices and/or attitudes that have an effect by design, or impact of, limiting women's rights in the workplace.⁶⁰²

⁵⁹⁹ *Ibid* at 18.

⁶⁰⁰ *Report into Workplace Harassment in the RCMP* (Civilian Review and Complaints Commission for the RCMP, 2017) at 5.

⁶⁰¹ Marie Deschamps, *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces* (External Review Authority, 2017).

⁶⁰² Judge Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report* (Commission on Equality in Employment, 1985). It is important to note the existence of intersectionality within women in Canada. Personal characteristics of women such as race and disability as well as the different work environments, such as mining and rural environments, will have a definitive impact when assessing the success or failure of human rights legislation. However, this level of detail exceeds the scope of the analysis in this research, although it leaves an open path for academic continuation and expansion of this important subject.

Overall, Canada has changed its domestic legislation at the federal and provincial levels to comply with its international obligations. However, a recent report by the CEDAW Committee established that the efforts implemented by Canada have been insufficient in achieving CEDAW's standards. Indeed, the CEDAW Committee reported concerns in numerous areas such as: the lack of knowledge in Canada about the content of the Convention its Optional Protocol;⁶⁰³ the federal government fails to use accountability mechanisms to hold provinces responsible for the implementation of the principles in CEDAW;⁶⁰⁴ the lack of a national gender equality strategy policy to address the factors that produce gender inequality;⁶⁰⁵ and the lack of coordination and the uneven implementation level of gender mainstreaming efforts between the federal and provincial governments.⁶⁰⁶ The Committee recommends the creation of a national gender strategy, policy and action plan to tackle the persistent factors causing inequality for women and girls, as well as providing the Minister of Status of Women with a strong directive and adequate technical, financial and human support to effectively create and implement the plan at federal, territorial and provincial levels.⁶⁰⁷ The recommendations indicate that legislation alone cannot succeed in eliminating gender-based discrimination, and that it is necessary to implement a national plan that would change the culture by eliminating the elements causing inequality for women in the workplace.

The next part of this chapter will provide insight into the legal framework and jurisprudence enacted in Colombia to eliminate discrimination against women in the workplace.

3.3 Legal framework enacted in Colombia to protect women from gender discrimination and harassment in the work environment

The feminist movement in Latin America has been influenced greatly by socio-political ideas from Europe and North America. This history has been divided by researchers into

⁶⁰³ CEDAW Concluding Observations on 8th and 9th reports of Canada, *supra* note 20 at 2.

⁶⁰⁴ *Ibid* at 3.

⁶⁰⁵ *Ibid* at 6.

⁶⁰⁶ *Ibid*.

⁶⁰⁷ *Ibid*.

three main periods: the first period or the suffragist period; a second period that emerged in the 1960s and 1970s, marked by the cultural and ideological development in Latin America with influences from the socialist movement and the Cuban revolution; and a third period, characterized by the globalization of the Latin American feminist movement, influenced by capitalism and neo-liberal concepts.⁶⁰⁸

In Colombia, the feminist ideals were initially brought forward in the socialist movements (such as organizations of farmers, students, indigenous peoples and unions), that focused on women living in rural areas and low-income women living in urban areas. During this period, Colombia experienced important feminist movements, such as Fabricato's women workers' strike in 1920, when working women organized, under the leadership of Betsabe Espinoza, and demanded an increase in their wages.⁶⁰⁹ Feminist groups continued to advocate for women's rights strongly during the period between 1930 and 1957, achieving important legislative changes with regard to working women's rights including the recognition of the right to vote in 1954.⁶¹⁰ During the 1960s and 1970s, vulnerable oppressed groups such as women and indigenous peoples adopted anti-capitalist ideals to forward their quests for equality. These ideals were prevalent until the late 1970s-1990s, when globalization and the changing priorities of international organizations shifted the feminist focus to economic development, ending poverty and human rights.⁶¹¹ These changes influenced the creation of the Constitution of 1991, which recognized equality rights for women and men alike.⁶¹²

Colombia has enacted domestic legislation to achieve the goals and standards established by international organizations. Colombia's Constitutional Court has also adopted noteworthy decisions in cases of discrimination against women in the work environment.

⁶⁰⁸ Doris Lamus Canavate, *De la subversión a la inclusión: movimientos de mujeres de la segunda ola en Colombia 1975-2005*, 1a. ed ed, Colección Antropología en la modernidad (Bogotá, D.C., Colombia: Instituto Colombiano de Antropología e Historia, 2010) at 33.

⁶⁰⁹ Lola González Luna, "Los Movimientos de Mujeres: Feminismo y Feminidad en Colombia (1930-1943)" (1985) 35 Bol Am 169 at 173.

⁶¹⁰ *Ibid* at 176.

⁶¹¹ Lamus Canavate, *supra* note 608 at 69.

⁶¹² Rodrigo Uprimny, Paola Molano & Diana E Guzmán, *Camino a la Igualdad?: Derechos de las Mujeres a Partir de la Constitución de 1991 - Sistematización Legal y Jurisprudencial*, 2nd ed (Bogotá, Colombia: Entidad de las Naciones Unidas para la Igualdad de Género y el Empoderamiento de las Mujeres - ONU Mujeres, 2015) at 11.

This part will examine the relative success (or failure) of Colombian legislation in achieving gender equality for working women, and compare that analysis to the commitments in this respect undertaken by Colombia in international human rights agreements. This section will conclude with a consideration of the laws and their critiques in comparison with the rights and goals established within international treaties and whether there is a gap between the international and national standards.

Colombia has ratified numerous international agreements with the main purpose of eliminating discrimination against women and girls, including CEDAW. Discrimination is defined in CEDAW as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equity of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁶¹³

Colombia has adopted and implemented this definition at the domestic level by virtue of the constitutional corpus principle.⁶¹⁴ Similarly, Colombia has incorporated article 3 of the ICESCR requiring Colombia to prevent any form of discrimination, including sex discrimination. It has also adopted article 3 of the International Covenant on Civil and Political Rights (ICCPR),⁶¹⁵ which requires it to guarantee the equality of women and men with regard to all civil and political rights and to prohibit and protect people from any form of discrimination based on prohibited grounds such as sex. Colombia has also incorporated into domestic law the 1969 American Convention on Human Rights (known as the Pact of San Jose),⁶¹⁶ which recognizes that all persons are born equal under the law and that governments should guarantee them the exercise of their rights without discrimination based on sex (and other grounds). These agreements create direct governmental responsibility to protect, prevent and promote equality for women in all areas, including economic activities such as paid work.

⁶¹³ CEDAW, *supra* note 236.

⁶¹⁴ Uprimny, Molano & Guzmán, *supra* note 598 at 22.

⁶¹⁵ ICCPR, *supra* note 495 at art 3.

⁶¹⁶ *The American Convention on Human Rights*, 22 November 1969, 1144 UNTS 144, OASTS No. 36 [*Pact of San Jose*]. (The Convention was ratified by Colombia on July 31, 1973 and not ratified by Canada).

The next subsection will discuss legislation enacted followed by key Constitutional Court decisions with respect to discrimination against women in the work environment.

3.3.1 Legislative protections against discrimination for working women in Colombia.

At a domestic level, Colombia's Civil Code legal system is centralized and based on the Political Constitution. In 1991, Colombia's Political Constitution adopted the French doctrine of the 'constitutional corpus'.⁶¹⁷ By virtue of the constitutional corpus principle, rules and regulations contained in international human rights treaties ratified by Colombia, such as the ILO conventions and CEDAW, form a fundamental part of the Political Constitution and are immediately integrated into the domestic legal system.⁶¹⁸ Also part of the constitutional corpus are the decisions of international organizations on human rights such as the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, the Human Rights Committee and the Committee on the Elimination of Discrimination Against Women.⁶¹⁹ These decisions are incorporated into the legal system and, as part of the Political Constitution, create the legal framework for the protection of women's rights.⁶²⁰

In Colombia, domestic legislation and litigation is harmonized with the rights and principles contained in the Constitution.⁶²¹ With regard to equality rights, article 13 of the Constitution protects the right to equality and prohibits any form of discrimination.⁶²² The article also states that all persons are born free and equal under the law and have the same rights, liberties and opportunities despite their sex, race, national and family origin, language, religion and political or philosophical affiliation. The article also contains the responsibility of the government to promote an equality that is real and effective by

⁶¹⁷ *Constitución Política de Colombia 1991*, *Gaceta Constitucional No. 127*, 10 octubre 1991 [*Constitución de Colombia*] at art.93.

⁶¹⁸ Rodrigo Uprimny, "El bloque de constitucionalidad en Colombia - Un Análisis Jurisprudencial y un Ensayo de Sistematización Doctrinal." (2005) *Univ Nac - ENS Colomb Curso Form Promot Derechos Hum Lib Sind Trab Decente* at 22.

⁶¹⁹ Uprimny, Molano & Guzmán, *supra* note 598 at 23.

⁶²⁰ *Ibid* at 22.

⁶²¹ *Constitución de Colombia*, *supra* note 31 at art 13.

⁶²² *Ibid*.

establishing affirmative actions in favor of minority groups that have been historically marginalized or discriminated.⁶²³ Protection of the rights of women is expanded by article 43 of the Constitution, which protects the equality of rights and opportunities of men and women.⁶²⁴ Furthermore, this article states that women must not be subject to any form of discrimination.⁶²⁵ Indeed, discrimination against working women in the paid labour force, enjoy a special constitutional focus established mainly by article 43 of the Constitution, which states that women and men should have the same rights and opportunities when joining paid labour activities.⁶²⁶ The same article also creates a special constitutional protection and assistance for women in the workplace that, due to their sex, are on circumstances and/or conditions that makes them vulnerable to discrimination, such as pregnancy and breastfeeding.⁶²⁷ This special protection allows courts to implement temporary affirmative action or positive discrimination, to level the legal ground between members of groups that have been historically oppressed.

Together with international human rights agreements and decisions, these constitutional principles and regulations create the initial framework for the protection of women against acts of discrimination and, as such, serve as the starting point of this analysis.

The Constitutional protections of women's equality rights have two main components. The first component is the right to equal protection of the law and the right to exercise real and effective equality rights and conditions in all spheres of life including work and labour related activities.⁶²⁸ The second component is the prohibition of discrimination and the obligation of the government to prevent and eliminate all forms of discrimination against women.⁶²⁹ To further regulate the principles established in the Constitution and to ensure the effective protection of the equality rights for working women, Colombia has enacted laws, regulations and norms. Some examples of these are: The Labour Code,⁶³⁰

⁶²³ *Ibid.*

⁶²⁴ *Ibid* at 43.

⁶²⁵ *Ibid.*

⁶²⁶ *Ibid.*

⁶²⁷ *Ibid*

⁶²⁸ *Constitución de Colombia, supra* note 31 at art 13.

⁶²⁹ Uprimny, Molano & Guzmán, *supra* note 598 at 22.

⁶³⁰ *Código Sustantivo del Trabajo y Código Procesal del Trabajo y de la Seguridad Social*, 5 August 1950 [*Código de Trabajo*].

Law 1257 of 2008 against gender violence,⁶³¹ Law 823 of 2003⁶³² protecting equality of employment conditions and opportunities, Law 581 of 2000⁶³³ on political participation of women in politics, Law 731 of 2001⁶³⁴ on the protection of rural women, Law 861 of 2003⁶³⁵ protecting property of female heads of family, Law 1010 of 2006⁶³⁶ on gender harassment at work, and Law 1429 of 2010⁶³⁷ on caretakers.

All of these laws create the domestic legal system enacted in Colombia to protect, prevent and promote the rights of women in the workplace. However, and despite extensive enacted legislation, equality has not been achieved and cases of discrimination find their way to litigation. In Colombia, the congress is the only body that can create and/or make changes to legislation. Judges and adjudicators have the responsibility of administering the law, however they are not able to change legislation by way of interpretation. The Constitutional Court has a somewhat different nature and it was created in 1991 with the specific purpose of ensuring that laws and regulations created by congress are harmonized with the constitutional principles and rights. The Court can also recommend changes to the law or parts of the law, or even declare the unenforceability or invalidity of a regulation if it goes against the Constitution. The next subsection will examine the main Constitutional Court decisions in cases of discrimination against women in the workplace.

⁶³¹ *Ley 1257 de 2008 - Normas de Sensibilización, Prevención y Sanción de Formas de Violencia contra las Mujeres*, Diario Oficial No. 47193, 4 December 2008 [Ley 1257/08].

⁶³² *Ley 823 de 2003 - Normas sobre igualdad de oportunidades para las mujeres*, Diario Oficial 45.245, 10 July 2003 [Ley 823/03].

⁶³³ *Ley 581 de 2000 - Participación Política de la Mujer*, Diario Oficial No. 44.026, 31 mayo 2000 [Ley 581/2000] at 581.

⁶³⁴ *Ley 731 de 2002 - Normas para favorecer a las mujeres rurales*, Diario Oficial 44.678, 14 January 2002 [Ley 731/02] at 731.

⁶³⁵ *Ley 861 de 2003 - Disposiciones Relativas al Único Bien Inmueble Urbano o Rural Perteneciente a la Mujer Cabeza de Familia*, Diario Oficial 45.415, 29 December 2003 [Ley 861/03].

⁶³⁶ *Ley 1010 de 2006 - medidas para prevenir, corregir y sancionar el acoso sexual y otros hostigamientos en el marco de las relaciones de trabajo*, Diario Oficial 46.160, 23 January 2006 [Ley 1010/06].

⁶³⁷ *Ley 1429 de 2010 - Formalización y Generación de Empleo*, Diario Oficial 47.937, 29 December 2010 [Ley 1429/2010].

3.3.2 Litigation in Colombia - Decisions of the Constitutional Court of Colombia

In Colombia, as in Canada, issues of discrimination against women are located within the jurisdiction of human rights. As such, most cases are decided by the Constitutional Court and not by the Supreme Court of Justice. The latter court has jurisdiction over all legal areas except cases that involve concepts contained in the Constitution, such as human rights, and/or the rights and principles that are part of the constitutional corpus, such as those in international human rights agreements.⁶³⁸

The constitutional protections and the automatic addition of international human rights principles as part of the constitutional corpus and the enacted domestic legislation, create the legal system in Colombia that protects women's rights. These are also reflected in important decisions of the Constitutional Court, the mandate of which is to make sure that the protections established by legislation are effectively implemented and create effective equality for women.⁶³⁹

The Court recognizes that effective equality is a right defined by its formal, substantive definition in the law as well as by the practical material application and expression of these rights by individuals.⁶⁴⁰ As such, the government must guarantee the real and effective protection of equality rights and the protection against any form of discrimination based on sex and/or gender.⁶⁴¹ The government also has a responsibility to provide special protection to groups that have been historically oppressed and discriminated against, as such adjudicators must take temporary affirmative action when needed to provide remedy for the victims.⁶⁴²

The Court has also created important tools for the interpretation of the law in the adjudication of cases of discrimination against women in three main areas; firstly,

⁶³⁸ *Constitución de Colombia*, *supra* note 31 at art 234, 241.

⁶³⁹ Uprimny, Molano & Guzmán, *supra* note 598 at 26,27,28; *Constitución de Colombia*, *supra* note 603 at art 241.

⁶⁴⁰ Uprimny, Molano & Guzmán, *supra* note 598 at 26,27.

⁶⁴¹ *Constitución de Colombia*, *supra* note 603 at art 13; Uprimny, Molano & Guzmán, *supra* note 598 at 23,24.

⁶⁴² *Constitución de Colombia*, *supra* note 603 at art 43; Uprimny, Molano & Guzmán, *supra* note 598 at 23,25.

recognition of the history of gender-based discrimination and oppression against women in all aspects of life including work and economic activities; secondly, the substantive and effective recognition, protection and promotion of equality rights for women; and thirdly, the creation of dogmatic tools to help judges recognize systemic discrimination.⁶⁴³ An example of one of these dogmatic tools created by the Court is the definition of sex and/or gender as ‘suspicious criteria’.⁶⁴⁴ The suspicious criteria concept was created by the Court, recognizing the fact that discrimination is systemic by nature and it is often normalized by the workplace culture, hence difficult to identify.⁶⁴⁵ As such, an adjudicator should implement a test to establish the existence of suspicious criteria by analysing the following elements: i) is the distinction, exclusion or restriction based on a permanent personal characteristic of an individual, that cannot be separated by that individual’s will without changing his/her identity?; ii) has this personal characteristic been historically perceived as inferior by society?; and iii) the personal characteristic does not constitute per se criteria to establish an equitable and rational process of distributing goods, rights or social burdens.⁶⁴⁶ In cases where, after applying the test, there is, in the opinion of the judge, presence of suspicious criteria, the case will require a strict constitutional review.⁶⁴⁷

The first element recognized in the Constitutional Court decisions is the history of oppression, exclusion and systemic discrimination of women. In its decisions, the Court

⁶⁴³ See *T-098-1994, MP Eduardo Cifuentes Muñoz*, 1994 Corte Constitucional de Colombia (available on <http://www.corteconstitucional.gov.co/relatoria/1994/T-098-94.htm>) at 3.; *T-247-2010, MP Humberto Antonio Sierra Porto*, 2010 Corte Constitucional de Colombia (available on <http://www.corteconstitucional.gov.co/relatoria/2010/T-247-10.htm>) at 3,4; *C-082-1999, MP Carlos Gaviria Díaz*, 1999 Corte Constitucional de Colombia (available on <http://www.corteconstitucional.gov.co/relatoria/1999/C-082-99.htm>) at 4.1; *C-112-2000, MP Alejandro Martínez Caballero*, 2000 Corte Constitucional de Colombia (available on <http://www.corteconstitucional.gov.co/relatoria/2000/C-112-00.htm>) at 7; *C-101-2005, MP Alfredo Beltrán Sierra*, 2005 Corte Constitucional de Colombia (available on <http://www.corteconstitucional.gov.co/relatoria/2005/C-101-05.htm>) at 3.1; *C-804-2006, MP Humberto Antonio Sierra Porto*, 2006 Corte Constitucional de Colombia (available on <http://www.corteconstitucional.gov.co/relatoria/2006/C-804-06.htm>) at 4; *C-964-2003, MP Álvaro Tafur Galvis*, 2003 Corte Constitucional de Colombia (available on <http://www.corteconstitucional.gov.co/relatoria/2003/C-964-03.htm>).

⁶⁴⁴ See *T-247/10*, *supra* note 643 at 3.4.; *T-098/94*, *supra* note 643 at 3.; *C-082/1999*, *supra* note 643 at 4.1.; *C-112/00*, *supra* note 643 at 7; *C-101/05*, *supra* note 643 at 3.1; *C-804/06*, *supra* note 643 at 4.

⁶⁴⁵ See *C964/03*, *supra* note 643 at 3; *C-101/05*, *supra* note 643 at 3.1; *C964/03*, *supra* note 643.

⁶⁴⁶ *C-481-1998, MP Alejandro Martínez Caballero*, 1998 Corte Constitucional de Colombia (available on <http://www.corteconstitucional.gov.co/relatoria/1998/C-481-98.htm>) at s 17.

⁶⁴⁷ *Ibid* at s 27.

often performs a deep analysis of the personal characteristics of the victim, adding a context of the historical exclusion, oppression and discriminatory environment embedded in Colombia's society. This analysis is a key element of the Court's decision and it also recognizes the precarious situation and systemic discrimination of women in Colombia. For example, in decision C-371 of 2000, the Constitutional Court recognized that women have been systemically excluded from public jobs and that this issue is a direct reflection of a social culture of exclusion that impacts women's equality rights.⁶⁴⁸ The Court also analysed the reasons behind the systematic exclusion of women from public positions and concluded that lack of preparation, experience and education are not real factors impeding women from accessing public positions, because in Colombia women reach equal or higher education levels than men.⁶⁴⁹ [The issues of education, the wage gap and segregation of employment was addressed in depth in chapter II of this thesis.] These findings led the Court to establish that the only reason behind the exclusion of women in public jobs is sex-based discrimination.⁶⁵⁰ After establishing that discrimination is a reality for many women to access positions in the public sector, the Court concluded that temporary affirmative action is needed and should be enforced through legislative tools such as those established in law 581 of 2000. This legislation created minimum quotas for the participation of women in public positions, helping Colombia reach its international established goals, as explained in Chapter 2.

The second element found in the Constitutional Court's decisions is the promotion of effective equality. Indeed, the Court has recognized the importance of effective equality for women using two main strategies: firstly, the recognition of the importance of the roles that women have as part of the Colombian culture and society, and the mandate of government and of the society to value, protect and respect these roles.⁶⁵¹ This strategy should not be interpreted to foster negative gender roles in society that could lead to stereotypes, but to recognize that gender pluralism exists in the society and that all

⁶⁴⁸ C-371-2000, MP Carlos Gaviria Díaz, 2000 Corte Constitucional de Colombia (available on <http://www.corteconstitucional.gov.co/relatoria/2000/C-371-00.htm>) at ss. 31, 42; *Constitución de Colombia*, *supra* note 603 at arts. 40, 43.

⁶⁴⁹ C-371/00, *supra* note 648 at s 39.

⁶⁵⁰ *Ibid* at ss 30(b), 45.

⁶⁵¹ *Ibid* at s 31; *Constitución de Colombia*, *supra* note 603 at arts. 1, 13, 43.

individuals have a role that should be recognized as having equal value to the economy and the society as a whole.⁶⁵² The Court recognized that women's work has been undervalued because most women in Colombia perform non-paid activities, such as taking care of their families and homes, and society places more value on positions that are placed in the paid segment of the market.⁶⁵³ A good example is decision T-494 of 1992, in which a woman, whose husband had died, was about to lose the house in which she had lived for 21 years with him. The case was initially dismissed because the judge at first and second instance did not consider that the "tutela"⁶⁵⁴ was the correct legal venue to ensure the protection of her rights.⁶⁵⁵ In Colombia, human rights are protected by an expedited legal process called "tutela". In this case, the judge considered that the "tutela" process was not adequate, because it did not breach any fundamental rights established in the Political Constitution. The Constitutional Court analyzed the case and decided that gender roles in society have undervalued women's role as caretakers and in this case the woman's 21 years of domestic work was ignored because of the unpaid nature of her daily activities. This was one of the first decisions of the Constitutional Court, and it changed the interpretation of articles 13 and 43 of the Constitution, created to protect the principle of equality. In its decision, the Court established that the systemic undervaluation of women's non-paid work is a clear breach of equality rights and that these kinds of activities should be recognized as having same value to the economy and to society as activities in the paid segments of society.⁶⁵⁶

The second strategy used by the Court to protect effective equality for women is to recognize that men and women are different, and that due to the patriarchal culture in Colombia, systemic discrimination has been normalized by society and women are more often victims of discrimination and exclusion.⁶⁵⁷ For this reason, systemic discrimination

⁶⁵² C-371/00, *supra* note 634 at s 31; *Constitución de Colombia*, *supra* note 603 at arts. 1, 13.

⁶⁵³ T-494-1992, MP *Ciro Angarita Barón*, 1992 Corte Constitucional de Colombia (available on <http://www.corteconstitucional.gov.co/RELATORIA/1992/T-494-92.htm>) at s II (4).

⁶⁵⁴ "Acción de Tutela": legal process used only in cases where there is a breach or a risk to the recognition and protection of fundamental rights recognized in the Political Constitution. See *Constitución de Colombia*, *supra* note 31 at art 86.

⁶⁵⁵ T-494/92, *supra* note 653 at s I (c).

⁶⁵⁶ *Ibid* at s II (4); *Constitución de Colombia*, *supra* note 31 at arts 13, 29, 43.

⁶⁵⁷ C-371/00, *supra* note 648 at s VII (22); C-410-1994, MP *Carlos Gaviria Díaz*, 1994 Corte Constitucional de Colombia (available on <http://www.corteconstitucional.gov.co/relatoria/1994/C-410-94.htm>) at s VII (d).

against women is difficult to identify and eliminate. The Court's suggestion is to level the legal ground for women by implementing temporary affirmative action in legislation and litigation of cases of discrimination against women, even if it creates inequality for members of privileged groups.⁶⁵⁸ In basic terms, the Court considers that the only way to reach effective equality for women is by giving different protection to individuals who are not in the same circumstances.⁶⁵⁹ A clear example of this differentiation is that of decision C-410 of 1994, where the Court analyzed the constitutionality of the law that established different ages for retirement for women and men. The Court decided that, in this case, the use of "positive discrimination" is needed to achieve effective equality and to protect minorities and groups who have historically been excluded and oppressed.⁶⁶⁰ Also, the Court recognized that, due to gender roles, women are primarily responsible for taking care of their homes and family even when they also have to keep paid jobs to help support their families.⁶⁶¹ In the Court's eyes, these added responsibilities create a two-leveled, or double-shift of work for women: one in the paid labour segment and a second one in the unpaid domestic and caretaking segment.⁶⁶² For these reasons, the Court decided that women work twice as much as men and, as such, the provisions in the law that allowed women to retire at an earlier age than men were adequate.⁶⁶³ Another example of the Court's strategy of using affirmative action to foster effective equality can be found in decision C-964/2003. In this decision, the Court analysed whether Law 82 of 1993 agrees with the concepts of equality in the Political Constitution when it established a special constitutional protection for single mothers. Once again, the Court decided that this group of women have experienced systemic exclusion and discrimination for years and, for this reason, the implementation of a special constitutional protection is adequate and needed to achieve effective equality.⁶⁶⁴

⁶⁵⁸ C-410/94, *supra* note 657 at s VII (d); C-371/00, *supra* note 648 at s VII (14); *Constitución de Colombia*, *supra* note 31 at art 13.

⁶⁵⁹ C-410/94, *supra* note 657 at s VII.

⁶⁶⁰ *Ibid* at s VII (c)(e).

⁶⁶¹ *Ibid* at s VII (f).

⁶⁶² *Ibid*.

⁶⁶³ *Ibid*.

⁶⁶⁴ C964/03, *supra* note 643 at s VI (4.1).

These cases are a good example of instances where the Court used affirmative action to provide a remedy for victims of discrimination; however, not all cases of positive discrimination are acceptable to achieve effective equality. Recognizing the dangers of abuse when using positive discrimination in the name of equality, the Court has established a proportionality test to decide if affirmative action represents the appropriate mean to achieve equality.⁶⁶⁵ The proportionality test allows the adjudicator to decide whether affirmative action is adequate and necessary, based on the proportionality principle. In decision C125-03, the Court defined the proportionality principle as the adjustment of the remedy to the damage caused by the unlawful action, when used in human rights cases.⁶⁶⁶ The principle is to be used to adjust the correction of systemic discrimination by granting special protection to groups which have been historically excluded by society. As such, affirmative action should be implemented only if: i) its purpose is valid and protected by the Constitution; ii) the differential treatment is needed to achieve the purpose; iii) the means used are needed to achieve the purpose; and iv) the differential treatment must be proportional *stricto sensu*.⁶⁶⁷ The Court has also established that, even though inequality or differential treatment is acceptable to level the rights of marginalized groups, positive discrimination actions should not be permanent as their purpose is to achieve equality. After effective equality is reached, the actions should cease.⁶⁶⁸

The Constitutional Court has also referred to the issue of gender-based stereotypes as an element causing systemic discrimination. Decision T-878/14 involved a woman who was terminated from her employment as an administrative assistant at a university because she was a victim of domestic violence, which she reported to the police. She stated that the university violated her human rights, specifically the right to not be discriminated against on the basis of sex, the right to work, and the right to live free from gender

⁶⁶⁵ C-371/00, *supra* note 648 at s 20; C-543-2010, MP Mauricio Gonzalez Garcia, 2010 Corte Constitucional de Colombia (available on <http://www.corteconstitucional.gov.co/RELATORIA/2010/C-543-10.htm>) at VI (5.1.6); C-410/94, *supra* note 657 at s VII (c).

⁶⁶⁶ C-125-2003, MP Marco Gerardo Monroy Cabra, 2003 Corte Constitucional de Colombia (available on <http://www.corteconstitucional.gov.co/relatoria/2003/C-125-03.htm>) at s VI (17).

⁶⁶⁷ C-543/10, *supra* note 665 at s 5.1.6; C-371/00, *supra* note 648 at s 20; C-410/94, *supra* note 657 at s VII (c); T-230-1994, MP, Eduardo Cifuentes Munoz, 1994 Corte Constitucional de Colombia (available on <http://www.corteconstitucional.gov.co/relatoria/1994/T-230-94.htm>) at s III A (c)(3).

⁶⁶⁸ C-371/00, *supra* note 648 at 20.

violence. The university considered that she breached her contract because her partner and attacker was a student at the university. The student received a warning for his behaviour.⁶⁶⁹ In this case, the Court stated that women have been given a reproductive role by society and this role has created the perception that women should also be obedient and reserved. It adds that negative stereotypes of women also describe them as nervous and unbalanced.⁶⁷⁰ These stereotypes are embedded in culture and they have negative consequences when identified in the work culture, fostering systemic discrimination.⁶⁷¹ The Court also recognized that governments and employers have the obligation of identifying and eliminating negative gender stereotypes as a way to prevent systemic discrimination embedded in the work environment.⁶⁷² The Court indicated that the legal system in Colombia was created to satisfy the needs of men and that, as such, it is sometimes blind to the needs of women. This issue materializes when victims of violence or discrimination are re-victimized when reporting the abuser to the police and when they decide to search for support with their employers.⁶⁷³ In this case, the Court insisted that employers, adjudicators and the police should always recognize that cases of discrimination and violence against women happen because the government and society have failed in their obligations to prevent these types of acts, hence acting with indifference or ignoring the act would only legitimize and normalize systemic discrimination, creating barriers to justice for victims, making them invisible to the legal system.⁶⁷⁴

The Constitutional Court recognizes gaps in the Colombian legal system for women to achieve effective equality. The recognition of the existence of embedded stereotypes that are cause and consequence of systemic discrimination is a good starting point for the implementation of solutions to prevent future cases of discrimination.

⁶⁶⁹ *T-878-2014, Jorge Iván Palacio Palacio*, 2014 Corte Constitucional de Colombia (available on <http://www.corteconstitucional.gov.co/relatoria/2014/T-878-14.htm>) at s 1.

⁶⁷⁰ *Ibid* at s 7 (III).

⁶⁷¹ *ibid*

⁶⁷² *ibid*

⁶⁷³ *Ibid* at 7(IV)

⁶⁷⁴ *Ibid* at 8

3.3.3 Summary

Despite the enactment of extensive legislation as well as the numerous decisions from the Constitutional Court, discrimination against women tends to linger in all areas of Colombian women's lives, including employment. The CEDAW Committee reported that Colombia falls short in achieving the goal of eliminating discrimination against women as established in the Convention. The Committee specifically expressed concerns about: the gross ineffectiveness of the implemented framework to eliminate discrimination;⁶⁷⁵ the opposing views within the government and judiciary bodies when implementing the Constitutional Court decisions;⁶⁷⁶ the persistent patriarchal attitudes and stereotypes about women's roles and obligation in the family, work and society; the lack of sufficient, consistent effective action from the government to eliminate these stereotypes.⁶⁷⁷ The Committee recommends that the government should address these concerns by giving ministerial rank to the Senior Presidential Advisor for Women's Affairs and providing it with more resources and direct mandate over gender-equality programs and policies, with the main purpose of educating the population and eliminating negative stereotypes causing systemic discrimination and violence against women and girls.⁶⁷⁸ The Committee also recommends that the government ensures the effective implementation of legislation enacted to protect women, and harmonizes the different views at the judicial and executive levels.⁶⁷⁹

As with Canada, legislation alone cannot achieve the goal of eliminating discrimination against working women. Legislation must be accompanied by a change of culture prompted by programs created to eliminate negative biases and stereotypes about women's value, roles, capacities and obligations in the workplace.

⁶⁷⁵ *Concluding Observations on the combined seventh and eighth reports for Colombia, UNOR, CEDAW/C/COL/CO/7-8, CEDAW/C/COL/CO/7-8, 2013 [Concluding Observations on the 7th and 8th reports of Colombia]* at 2.

⁶⁷⁶ *Ibid* at 3.

⁶⁷⁷ *Ibid*.

⁶⁷⁸ *Ibid*.

⁶⁷⁹ *Ibid*.

3.4 Final Remarks

This thesis chapter presented the legal framework that has been enacted in Canada and in Colombia to protect women from discrimination in the work environment. Colombia and Canada are parties to the United Nations and to the International Labour Organization, and have subscribed to international treaties and conventions with a clear mandate of achieving gender equality and eliminating discrimination against women in all areas of life, including employment.

The next chapter of this thesis will contain in-depth comparisons and conclusions about Chapters 1, 2 and 3 that will provide thorough insight about the similarities and differences of Canada and Colombia with respect to working women's rights. However, after explaining the legal system enacted in Colombia and in Canada, and as preliminary findings in this chapter, it is clear that neither country has been able to achieve fully non-discriminatory work environments. However, both countries have recognized the flaws in the system, specifically the existence of embedded stereotypes, that have been normalized and are the root of systemic discrimination against women who join the paid labour environment. The recognition of this issue has aided both governments to take action in eliminating the issue by enacting legislation to prevent future cases. As well, litigation has been active in both countries, which indicates that legislation alone is not enough to achieve effective equality for women. It is interesting to note that both countries have located the issue of workplace discrimination against women within the human rights jurisdiction, limiting the action of victims who seek remedies within the civil jurisdiction.

Also, important to note are the differences in how the issue of discrimination is addressed by the Supreme Court of Canada and the Colombian Constitutional Court. The Constitutional Court provides a remedy to the flaws of systemic discrimination by applying temporary, positive discrimination to level the legal ground for women, even if it means creating discrimination for a historically privileged group. In Canada, however, the Court focuses on creating rules and regulations for employers to prevent future cases of discrimination. Examples of these are the Court's recommendations in the decisions of *Janzen* and in *Meiorin*. This differences can be explained by the fact that judges in

Colombia are not able to modify the law, they should administer justice; however, the Constitutional Court can make recommendation for changes of legislation or to even declare it legally invalid, if a specific law or norm goes against the rights and principles contain in the *Magna Carta*.

It is important to note once more that Colombia and Canada have important differences such as legal systems, political organization, world economic position and the important factor of a recently-concluded armed conflict in Colombia. However, for purposes of this specific research these are factors that do not have an impact as the international obligation of both countries to eliminate discrimination against women applies despite said differences.

This thesis will now turn to Chapter 4, expanding on the reflections and conclusions about the main topic in this LL.M. thesis.

CHAPTER 4

4. CONCLUSIONS AND REFLECTIONS

The recognition and protection of women's rights is of major importance for the effective development of their lives as individuals and as members of the communities in which they live. Women are an essential factor in the positive development of families, the economy and society.⁶⁸⁰ This fact has been recognized by numerous international organizations, including the UN. Furthermore, in 2014 the UN produced a publication titled "Women's Rights are Human Rights" in which it stated that: "Effectively ensuring women's human rights requires a comprehensive understanding of the underlying societal structures and power relations that define and influence women's ability to enjoy their human rights."⁶⁸¹ The right to work is a basic right that women should be able to enjoy free of prejudice, discrimination and harassment. To achieve this important goal, governments, employers and unions must revise, change and enact gender-sensitive legislation and policies that are free from systemic discrimination caused by stereotypes of women's roles and obligations.⁶⁸²

This thesis compared two legal systems with shared international obligations and a main goal: attaining equality for working women. The main objective of this thesis is to analyze the extent to which labour and employment law as currently constituted succeeds, and fails to succeed, in achieving equality for female workers in Colombia and Canada. To attain this important objective, this thesis used the comparative law method, as explained in the introductory chapter.⁶⁸³ First, it established a common social function within the two countries. These goals or common social functions have been codified in international agreements adopted under the auspices of the ILO and UN and ratified by Colombia and Canada. These treaties provided a basis for the comparisons. Secondly, this thesis examined the context in which domestic laws on women's rights at work were enacted, to evaluate the operation of the norms with the purpose of recognizing,

⁶⁸⁰ *Supra* note 259 at 4,23.

⁶⁸¹ United Nations, *supra* note 493 at 25.

⁶⁸² Scales, *supra* note 562 at 1395,1403.

⁶⁸³ David J Gerber, "System Dynamics: Toward a Language of Comparative Law" (1998) 46:4 Am J Comp Law 719.

protecting and promoting the rights of working women in Colombia and Canada. By applying this methodology, this thesis created new legal knowledge that helped legitimate legal theory, as different theoretical positions were tested in more than one legal system, providing them with evidence of their effectiveness or ineffectiveness in achieving equality for women in employment.⁶⁸⁴

This thesis also used feminist jurisprudence methodology.⁶⁸⁵ Feminist jurisprudence bases its legal theory on the need to add women's opinions and experiences into the discussions of legal doctrine and state theory. These opinions have been ignored historically and left out from the process of crafting the environments that women are looking to access today, such as paid employment and politics.⁶⁸⁶ For the last century, feminist jurists have pursued the feminist goal of questioning legislation that is part of a legal system designed by men to dominate women.⁶⁸⁷ This thesis focused on the issue of equality in employment because the workplace is one of the spaces initially created as a male environment, that tended to the needs of men and ignored women. Indeed, the work environment was shaped under the influence of stereotypical gender roles where women were supposed to care for their homes and families and men were viewed as the main breadwinners. To keep this universal objective reality present, employment norms were developed with the purpose of controlling and excluding women from paid work.⁶⁸⁸

The feminist theory of male control of the legal environment rests on three main premises: firstly, legal doctrines have a fundamental male bias even if they are presented as gender-neutral; secondly, women's lives and experiences are different from men's lives and experiences; and finally, legal doctrine fails to take into consideration women's

⁶⁸⁴ *Ibid.*

⁶⁸⁵ Feminist jurists have pursued the feminist goal of questioning legislation that is part of a legal system designed by men to dominate women. This theory of male-control of the legal environment rests on three main premises: firstly, legal doctrines have a fundamental male bias even if they are presented as gender neutral; secondly, women's lives and experiences are different from men's lives; and finally, legal doctrine fails to take into consideration women's experience and perceptions. The acknowledgement of these premises will naturally generate a feminist overall distrust of the law, and a need to question its effectiveness in achieving equality. See Baer, *supra* note 583 at 3; Scales, *supra* note 562 at 1374; Littleton & MacKinnon, *supra* note 596 at 752; Wendy W Williams, "Equality's riddle: Pregnancy and the equal treatment/special treatment debate" (1984) 13 NYU Rev Soc Change 325 at 353, 366, 370.

⁶⁸⁶ Boyd, *supra* note 521 at 179, 184.

⁶⁸⁷ *Ibid* at 183–184; Baer, *supra* note 583 at 3.

⁶⁸⁸ Williams, *supra* note 685 at 353.

experience and perceptions.⁶⁸⁹ The acknowledgement of these premises will naturally generate a feminist overall distrust of the law, and a need to question its effectiveness in achieving equality. This is the main objective of this thesis, as more Canadian and Colombian women have joined the work environment under clear conditions of inequality. The fact that, after a century of effort, equality is not yet achieved, shows that labour and employment legislation as currently enacted is insufficient to attend to the needs of the female population.⁶⁹⁰

Based on the analysis of the facts presented in this research, the immediate answer to the question of whether either Colombia or Canada have achieved effective equality for female workers is, unfortunately, that they have not. Even though both countries have ratified numerous international agreements on non-discrimination and taken steps domestically to meet those obligations, both have been unsuccessful to date in achieving the evasive goal. These negative results were presented by the CEDAW Committee in its Concluding Observations on the eighth and ninth periodic reports for Canada,⁶⁹¹ and the seventh and eighth periodic reports for Colombia.⁶⁹² In Canada's case, the CEDAW Committee recommended the creation of a comprehensive national gender strategy, policy and action plan to address the structural factors that cause inequality with respect to women and girls.⁶⁹³ In the area of employment, the Committee stated its concern with the slow progress made and cited special areas of alarm such as the: persistent wage gap; lack of effective legislation on the principle of equal pay for work of equal value at the federal and provincial levels; continuing vertical and horizontal occupational segregation; high concentration of women working in part-time and low-paid jobs, due to child-raising and caretaking responsibilities; low representation of women in managerial positions; lack of affordable childcare; and prevalence of sexual harassment in the workplace and lack of effective measures to prevent it.⁶⁹⁴ The Committee made a similar recommendation in 2013 to the government of Colombia, by asking it to "develop a

⁶⁸⁹ Baer, *supra* note 583.

⁶⁹⁰ Rosemary A Venne, "A Half Century of Work Women in the Labour Force" (2004) 67 Sask Law Rev 489 at 6.

⁶⁹¹ CEDAW Concluding Observations on 8th and 9th reports of Canada, *supra* note 20.

⁶⁹² Concluding Observations on the 7th and 8th reports of Colombia, *supra* note 675.

⁶⁹³ CEDAW Concluding Observations on 8th and 9th reports of Canada, *supra* note 20 at 21(b).

⁶⁹⁴ *Ibid* at 38.

comprehensive strategy targeted at women, men, girls and boys to overcome patriarchal and gender-based stereotypical attitudes about the roles and responsibilities of women and men in the family and in society.”⁶⁹⁵ With regard to the area of employment, the Committee’s concerns focused on issues such as: the high pay-gap; the high female unemployment rate; high levels of occupational segregation; and the high percentage of the female population working in the informal sector with no access to social security benefits.⁶⁹⁶ These recommendations by CEDAW demonstrate that neither Canada nor Colombia have been successful in achieving effective equality for women in employment.

This research work was divided into three main chapters: Chapter 1 referred to legislation protecting maternity rights and the recognition and value of women’s domestic and care work; Chapter 2 spoke about the principle of equal pay for work of equal value and the issue of the gender wage gap; and Chapter 3 discussed the issue of workplace discrimination and harassment. The following results and conclusions will provide reflections on the most pressing issues for women as identified in this research. These are: protection of maternity rights; affordable daycare; the recognition and economic value of care and domestic work; pay equity; the gender wage gap; the overrepresentation of women in informal, low paid and precarious jobs; segregation of employment; and, discrimination and harassment.

The results and the comparisons will be finalized under established common international goals, standards and best practices set out by international organizations such as ILO and UN, providing a common social goal that will serve as the “Rosetta Stone” when comparing different legal languages and systems such as the Colombian civil code legal system and the Canadian common law legal system. It will also provide suggestions on changes that could improve the wellbeing and income of working women and their families.

⁶⁹⁵ *Concluding Observations on the 7th and 8th reports of Colombia*, *supra* note 675 at 14(1).

⁶⁹⁶ *Ibid* at 27.

4.1 Recognition and Value of Domestic Work

Due to gender stereotypes in both Canadian and Colombian societies, women are often viewed as the main caregivers for their homes and families, and have been performing these activities for centuries without payment and as their ‘natural’ obligations, in the private realm of their families.⁶⁹⁷ These gender stereotypes have blended into the public spheres of society for generations, and are still present today, causing inequalities in assigning value to women’s domestic work.⁶⁹⁸ These issues have caused concern within international organizations such as the ILO because there is an overrepresentation of women performing domestic activities without pay and without protection from domestic employment and labour laws.⁶⁹⁹

Indeed, the ILO has recognized the economic and social value of domestic work, and condemned the fact that these activities remain poorly regulated by labour and employment legislation.⁷⁰⁰ As such, the ILO adopted a Convention concerning decent work for domestic workers in 2011 (No. 189),⁷⁰¹ as well as recommendation No. 201,⁷⁰² stating that domestic workers must enjoy the same labour rights and guarantees as those available to other workers.⁷⁰³ The Convention was ratified by Colombia on May 9, 2014, and has not been ratified by Canada. However, the CEDAW Committee, in its General Recommendation No. 17, recognized the value of unremunerated domestic activities of women and recommended that State parties:

(a) Encourage and support research and experimental studies to measure and value the unremunerated domestic activities of women; for example, by conducting time-

⁶⁹⁷ Boyd, *supra* note 521.

⁶⁹⁸ *Supra* note 666 at 4.; Kate McInturff, “Women’s work: what’s it worth to you?” (2016) January/February Can Cent Policy Altern, online: <<https://www.policyalternatives.ca/publications/monitor/women%E2%80%99s-work-what%E2%80%99s-it-worth-you>>.

⁶⁹⁹ *Supra* note 259 at 36.

⁷⁰⁰ Debbie Budlender, International Labour Office & Conditions of Work and Employment Programme, *Measuring the economic and social value of domestic work: conceptual and methodological framework* (Geneva: ILO, 2011).

⁷⁰¹ *Convention (No. 189) concerning decent work for domestic workers, 16 June 2011, PR No. 15A [ILO Convention No. 189]*. (Entry into force 05 September 2013, ratified by Colombia 09 May 2014, not ratified by Canada)

⁷⁰² *Recommendation (No. 201) concerning decent work for domestic worker, 16 June 2011, 100th ILC session [ILO Recommendation No. 201]*.

⁷⁰³ Budlender, International Labour Office & Conditions of Work and Employment Programme, *supra* note 700 at 82.

use surveys as part of their national household survey programmes and by collecting statistics disaggregated by gender on time spent on activities both in the household and on the labour market;

(b) Take steps, in accordance with the provisions of the Convention on the Elimination of All Forms of Discrimination against Women and the Nairobi Forward-looking Strategies for the Advancement of Women, to quantify and include the unremunerated domestic activities of women in the gross national product;

(c) Include in their reports submitted under article 18 of the Convention information on the research and experimental studies undertaken to measure and value unremunerated domestic activities, as well as on the progress made in the incorporation of the unremunerated domestic activities of women in national accounts.⁷⁰⁴

Furthermore, UN's Sustainable Development Goal No. 5 indicates that states should take action in the form of "recognizing and valuing unpaid care and domestic work through the provision of public services, infrastructure and social protection policies and the promotion of shared responsibility within the household and the family as nationally appropriate".⁷⁰⁵ Both Canada and Colombia support this goal.⁷⁰⁶ These international law documents, legally binding in the case of Colombia with ILO Convention No. 189, illustrate the importance of recognizing and valuing the important work that women perform in taking care of their families and homes.

To follow-up with its international obligation, the Constitutional Court of Colombia, in decision T-494 of 1992,⁷⁰⁷ recognized that women's domestic work has been perceived as labour of lesser value than that of men. These perceptions make women's contributions to their family and the household economy almost invisible to the eyes of the community.⁷⁰⁸

⁷⁰⁴ *General Recommendation No. 17: Measurement and quantification of the unremunerated domestic activities of women and their recognition in the gross national product*, CEDAW Rec 17, UNOR 10 Sess, UN Doc. A/46/38 (1991) [CEDAW, General Recommendation No. 17].

⁷⁰⁵ *Transforming our World: the 2030 Agenda for Sustainable Development*, UNGAOR, 17th Sess, UN Doc. A/Res/70/1, (2015) [Transforming our World: the 20/30 Agenda for Sustainable Development] at goal No. 5.

⁷⁰⁶ Global Affairs Canada Government of Canada, "The 2030 Agenda for Sustainable Development", online: GAC <http://international.gc.ca/world-monde/issues_development-enjeux_developpement/priorities-priorites/agenda-programme.aspx?lang=eng>; "Colombia: Sustainable Development Knowledge Platform", online: U N <<https://sustainabledevelopment.un.org/memberstates/colombia>>.

⁷⁰⁷ T-494/92, *supra* note 653.

⁷⁰⁸ Rodrigo Uprimny, Paola Molano & Diana E Guzmán, *Camino a la Igualdad?: Derechos de las Mujeres a Partir de la Constitución de 1991 - Sistematización Legal y Jurisprudencial*, 2nd ed (Bogotá, Colombia:

In this decision, the Court also decided that these perceptions are contrary to articles 13⁷⁰⁹ and 43⁷¹⁰ of the Political Constitution, and that unpaid work is valuable to the individual household and to the overall economy of the country. As such, women's domestic work should be recognized by legislation as an economic labour activity.⁷¹¹ However, it was not until 2010 that Law 1413, better known as the "The Economy of Care-work Law",⁷¹² was enacted to recognize and protect the economic value of the unpaid work of women dedicated to domestic work. The law also included unpaid and domestic work in the National Accounts System (SCN)⁷¹³ with the purpose of tracking and measuring the economic value of these activities. The Court also recognized that women who decide to join the paid labour market continue to perform unpaid domestic work in their households more so than employed men. As such, they should be considered to have a dual work shift that adds up to seven hours of daily work to their schedules. This fact should be considered by employers when planning work shifts for mothers with care and domestic obligations.⁷¹⁴ Even though Colombia has commenced the process of recognizing the value of domestic work through litigation and legislation, the country is still far from achieving the ILO and UN's established goals, as women in these jobs continue to be excluded from the protections of employment laws, such as minimum wage and social security benefits.

In Canada, there is no economic recognition of the unpaid caregiving work that women perform for their families. Even though domestic work in Canada remains unrecognized as a "productive" economic labour activity and is therefore unpaid, Canadian legislation indirectly protects the wellbeing of women dedicated to the care and domestic work

Entidad de las Naciones Unidas para la Igualdad de Género y el Empoderamiento de las Mujeres - ONU Mujeres, 2015) at 29.

⁷⁰⁹ *Constitución Política de Colombia*, 10 octubre 1991 [*Constitución Política de Colombia*] art 13. – "All persons are born free and equal before the law"

⁷¹⁰ *Ibid.* art. 43 "Men and women have the same rights and responsibilities. Women will not be discriminated."

⁷¹¹ *T-494/92*, *supra* note 653 at II.4.

⁷¹² *Ley 1413 de 2010 - Inclusión de la Economía del Cuidado en el Sistema de Cuentas Nacionales*, *Diario Oficial* 47.890, 11 noviembre 2010 [*Ley 1413/10*].

⁷¹³ SCN, implemented by DANE, the National Accounts System, provides macroeconomic data of the Colombian economy. See "Ficha Metodológica - Cuentas Nacionales Anuales", (30 septiembre 2010), online: *Dep Adm Nac Estad*

<https://www.dane.gov.co/files/investigaciones/fichas/pib/ficha_ctas_anuales.pdf>.

⁷¹⁴ *C-410/94*, *supra* note 657 at VII(f).

mainly through benefits, such as the child and family tax benefits and others established by the Employment Insurance Act and regulations. Said benefits include the Canada Child Benefit, the Goods and Services Tax/Harmonized Sales Tax (GST/HST) credit and their related provincial and territorial programs as well as working income tax benefit and other federal programs. These programs are not directly created with the purpose of recognizing the economic value of the domestic work that women perform for their families, however they do help indirectly, by providing economic relief to the families of women and men who work taking care of their homes and families. Although important, these protections are insufficient to an effective system that values the unpaid care and domestic work that women perform for the welfare of their families. Furthermore, they do not address the recommendations set out by the ILO and UN.

It is clear, however, that both countries continue to show the existence of strong gender biases and stereotypes about women's roles and obligations in society, creating a system of discrimination that undervalues the work performed by women in the private sphere of their homes.⁷¹⁵ The issue of pay equity and segregation of jobs and occupations will be addressed below, however suffice to say that to increase the economic and overall wellbeing of women, there is a need in Canada to: first, ratify ILO Convention No.189, concerning decent work for domestic workers; second, create legislation and programs that recognize and measure the value of domestic and care activities; third, develop awareness programs to eliminate the stereotypes related to women's roles in the family and at work; and fourth, extend labour and employment legislation to cover women working in the informal sector. In Colombia, to achieve the goals established by the ILO and UN there is a need to: first, develop legislation from solely measuring to providing an effective protection's system, free from stereotypes, for women dedicated to domestic activities; second, create awareness programs for employers, unions and governments to eliminate the gender stereotypes that cause systemic discrimination for women working in the unpaid sector; and third, extend social security benefits to protect women working in informal activities, such as domestic workers.

⁷¹⁵ *Supra* note 259 at 4.

These measures, if enacted, will bring the two countries closer to achieving the UN and ILO's labour standards for domestic workers, many of which are women.

4.2 Maternity Rights

One of the main differences between men and women is women's childbearing capacity. Indeed, to date only women can become pregnant, and this element is an essential part of their lives. In the specific area of employment, pregnancy has created a discussion on how the law can protect and aid women in effectively harmonizing their reproductive and productive roles.⁷¹⁶ Furthermore, the United Nations has recognized that economic rights and the right to employment are part of the group of human rights necessary for the holistic development of women as individuals.⁷¹⁷ As such, the UN calls on governments to devise a system to help women balance their work and family lives by implementing rules and regulations to accommodate them during pregnancy.⁷¹⁸ Moreover, CEDAW guards the rights of pregnant working women, in its article 11, calling on State parties to protect women from discrimination in employment by introducing legal protections to maternity leave with pay or with comparable social benefits and without the loss of employment, seniority or social allowances.⁷¹⁹ The length of the maternity leave has been recognized by the UN as critical to: first, maintain the health of the mother and the child during the pregnancy period; and second, for mothers to recover from childbirth and return to work while providing care to their children during the first months of life.⁷²⁰ There is, however, discussion within countries around the ideal length of the maternity leave; if the leave is too short, mothers might feel not ready to return to work, leading to attrition and moving women out of the workforce. On the other hand, when employees stay off work for an excessive period, they might lose important skills and become

⁷¹⁶ Addati, Cassirer & Gilchrist, *supra* note 92.

⁷¹⁷ *Beijing Declaration*, *supra* note 516 at 3(15).

⁷¹⁸ *Ibid.*

⁷¹⁹ CEDAW, *supra* note 236 at art 11 (2); *General Recommendation No. 24: Article 12 of the Convention (women's health and human rights)*, CEDAW. Rec 24, UNOR 20th Sess, UN Doc. A/54/38/Rev.1, chap. I (1999) [CEDAW General Recommendation No.24] at 28.

⁷²⁰ Laura Addati, Naomi Cassirer & Katherine Gilchrist, *Maternity and paternity at work: law and practice across the world* (Geneva: International Labour Office, 2014) at 8.

disengaged, impacting performance, and resulting in wage penalties.⁷²¹ With these elements in mind, international organizations such as the ILO have attempted to establish the ideal length for the maternity leave. ILO Convention No. 03, (ratified by Colombia) in its article 3(a) states that a new mother “shall not be permitted to work during the six weeks following her confinement”. This period was extended to at least eighteen weeks by ILO Recommendation No. 191, paragraph 1(1). In this area, Colombia meets the standard established in ILO Convention No.03 and ILO’s Recommendation No.191.⁷²² In Canada, only the provinces of Saskatchewan⁷²³ and Quebec,⁷²⁴ have enacted legislation to extend maternity leave to eighteen weeks, as established in ILO Recommendation No. 191.⁷²⁵

In addition, non-binding but influential international norms of gender equality in the workplace have been expressed in the UN’s Sustainable Development Goals.⁷²⁶ The Sustainable Development Goals recognize gender equality as an essential foundation for a peaceful, prosperous and sustainable world.⁷²⁷ Gender equality for women will necessarily include a balance of women’s productive and reproductive roles. Therefore, the protection of maternity rights is essential to the achievement of Sustainable Development Goal No. 5 of achieving gender equality and empowerment of all women and girls. It also contributes to the achievement of other related sustainable goals.⁷²⁸ To achieve Sustainable Development Goal (SDG) No. 5, the UN has established targets to be achieved globally such as: ending all forms of discrimination against women and girls everywhere; recognizing and valuing unpaid care and domestic work through the

⁷²¹ *Ibid* at 9.

⁷²² In 2017, the Senate approved and implemented a modification to article 236 of the Labour Code extending the maternity leave from fourteen weeks to eighteen weeks.

⁷²³ *The Saskatchewan Employment Act, SS 2013, c S-15.1* [*The Saskatchewan Employment Act, SS 2013, c S-15.1*] at 2–49(1).

⁷²⁴ *An Act Respecting Labour Standards, CQLR c N-1.1* [*An Act Respecting Labour Standards, CQLR c N-1.1*] at 81.3.

⁷²⁵ Researchers have established that the ideal maternity leave period for working mothers should not be lower than six months and should not extend for more than one year. See Laura Colby, “Can You Have Too Much Maternity Leave? In Europe, Maybe”, *Bloomberg.com* (28 February 2017), online: <<https://www.bloomberg.com/news/articles/2017-02-28/can-you-have-too-much-maternity-leave-in-europe-it-s-possible>>.

⁷²⁶ *Transforming our World: the 2030 Agenda for Sustainable Development*, *supra* note 705.

⁷²⁷ *Ibid* at 20.

⁷²⁸ For example: Goal No. 1 that aims to reduce all forms of poverty and Goal No. 8 that strives to promote inclusive and sustainable economic growth through full employment and decent work. See *Ibid* at 15, 19.

provision of public services, infrastructure and social protection policies; and the promotion of shared responsibility within the household and the family as nationally appropriate.⁷²⁹ Both Colombia and Canada have indicated support and commitment to UN's sustainable development goals.⁷³⁰ The internationally-established standards serve as guide and measure of the success or failure of State parties' efforts to help women harmonize their productive and reproductive roles. Recognizing that "maternity is a condition which requires differential treatment to achieve genuine equality,"⁷³¹ the Colombian and Canadian governments have modified, developed and enacted legislation to protect the maternity rights of women in the workplace.

In Colombia, for example, maternity rights for working women are protected by articles 43-53 of the Political Constitution, which proclaim that women should not be discriminated against because of their sex and that they have equal rights and obligations as men.⁷³² Furthermore, the articles establish that the government should give special protection to pregnant women or women who have recently given birth.⁷³³ These rights are further developed at the law level by chapter V (articles 236-246) of the Labour Code. Articles 236 to 238 of the same Code regulate maternity and parental leaves.⁷³⁴ However, the most important protection for pregnant and breastfeeding employees rests in article 239 of the Colombian Labour Code, which creates constitutionally reinforced job stability, that is, the prohibition against terminating the employment of a pregnant employee or a new mother (extending the protection for three months after childbirth) due to her pregnancy or breastfeeding conditions.⁷³⁵ This special protection also extends to the spouse of a pregnant women working in domestic activities. It is important to remember that, during the maternity leave, the income of the mother is assumed by social security benefits, lifting the economic burden from employers who might be otherwise not wish to hire women during their childbearing years. These legal protections are

⁷²⁹ *Ibid* at goal 5(5.4).

⁷³⁰ Government of Canada, *supra* note 692.

⁷³¹ International Labour Conference (83rd session), *Equality in Employment and Occupation*, III (Part4B) (Geneva, Switzerland: International Labour Office, 1996).; Scales, *supra* note 562 at 1375.

⁷³² *Constitución de Colombia*, *supra* note 603 at arts. 43,53.

⁷³³ *Ibid*, p art. 43.

⁷³⁴ *Código de Trabajo*, *supra* note 616 at arts. 236,238.

⁷³⁵ *Ibid* at art 239.

applicable to women working in formal employment, which leaves an important portion of the female population working in the informal sector unprotected and vulnerable.

In Canada, federal legislation protects working women who are pregnant, mainly through maternity leave benefit legislation in its Labour Code.⁷³⁶ Provincially, maternity leave is regulated by local employment legislation that varies amongst provinces. Despite the differences in length and eligibility, all provinces in Canada have recognized the need for protected maternity, parental and pregnancy rights. Most provinces (except for Quebec) have adopted similar periods for paid maternity, parental and adoption leave.⁷³⁷ This research explained the individual periods by province in Chapter 1.

Even though federal and provincial law protects the rights of mothers to enjoy time off work after childbirth, the amount of time that parents can enjoy with their growing families will depend on the economic stability of the family. During maternity and parental leaves, most provinces will allow new parents to receive employment insurance benefits that will cover a percentage of their wages during their time off work.⁷³⁸

Through the analysis of legislation and litigation, this research established that Colombia and Canada have enacted domestic legislation to comply with obligations established by CEDAW's article 11. The legal tools in place for the two countries are similar, and largely effective in protecting the rights of pregnant working women within the formal sector. However, both countries present a gap in the recognition and protection of

⁷³⁶ *Canada Labour Code*, RSC 1985, c L-2 [Canada Labour Code, RSC 1985, c L-2] at Div VII.

⁷³⁷ *An Act Respecting Labour Standards*, CQLR c N-1.1, *supra* note 724 at 81.4.; *Employment Standards Act*, 2000, SO 2000, c 41 [Employment Standards Act, 2000, SO 2000, c 41] at 46.1.; *The Saskatchewan Employment Act*, SS 2013, c S-15.1, *supra* note 723 at 2–49(1).; *The Employment Standards Code*, CCSM c E110 [The Employment Standards Code, CCSM c E110] at 54(1).; *Employment Standards Act*, RSBC 1996, c 113 [Employment Standards Act, RSBC 1996, c 113] at 50(1).; *Employment Standards Code*, RSA 2000, c E-9 [Employment Standards Code, RSA 2000, c E-9] at 46(1).; *Employment Standards Act*, SNB 1982, c E-7.2 [Employment Standards Act, SNB 1982, c E-7.2] at 43(1).; *Labour Standards Code*, RSNS 1989, c 246 [Labour Standards Code, RSNS 1989, c 246] at 59(1).; *Employment Standards Act*, RSPEI 1988, c E-6.2 [Employment Standards Act, RSPEI 1988, c E-6.2] at 20 (01).; *Labour Standards Act*, RSNL 1990, c L-2 [Labour Standards Act, RSNL 1990, c L-2] at 42.1.; *Employment Standards Act*, RSY 2002, c 72 [Employment Standards Act, RSY 2002, c 72] at 36 (2).; *Employment Standards Act*, SNWT 2007, c 13 [Employment Standards Act, SNWT 2007, c 13] at 26(1).; *Labour Standards Act*, RSNWT (Nu) 1988, c L-1 [Labour Standards Act, RSNWT (Nu) 1988, c L-1] at 31 (2).

⁷³⁸ *Ibid.*

pregnant women working in the informal and unpaid sector of the economy.⁷³⁹ In Canada, for example, federally-regulated employees are entitled to seventeen weeks of maternity leave, after six months of employment. Provincially, employment legislation, (as presented in chart No. 1 of Chapter 1) will dictate the amount of time a woman would have to be formally employed before being eligible for maternity leave protection and benefits. To address this issue, the CEDAW Committee has recommended that the government create more opportunities for women to gain full-time employment,⁷⁴⁰ and access the benefits and protections established in the law.

In Colombia, similarly to Canada, the maternity leave benefits are paid through the Social Insurance Institute and regulated by article 166 of law 100 of 1993; this law requires employers to register and make deductions from the employees' income, to be eligible for benefits. The wording of the maternity protection laws leaves a large group of working women - self-employed, domestic, part-time, contract, freelancers, etc. - unprotected and unable to access social security benefits and legal protections to allow them to enjoy time off from work during pregnancy and in the period immediately after childbirth.⁷⁴¹ To address this issue, the CEDAW Committee has recommended that the Colombian government should monitor the wellbeing of women working in the informal sector to ensure that they have access to social security benefits.⁷⁴²

It is worth noting that there is the option in Canada and in Colombia for self-employed individuals to make voluntary contributions to employment insurance, in Canada,⁷⁴³ and to the health system in Colombia.⁷⁴⁴ However, these contributions represent an added economic burden to jobs that are generally considered low income and precarious.

Another important element to consider when supporting working mothers after their maternity leave expires is the existence of affordable childcare. Indeed, many women need to find someone to take care of their children while they return to their jobs; thus, it

⁷³⁹ CEDAW Concluding Observations on 8th and 9th reports of Canada, *supra* note 20 at 38(b).; *Concluding Observations on the 7th and 8th reports of Colombia*, *supra* note 675 at 27.; *supra* note 259 at 38.

⁷⁴⁰ CEDAW Concluding Observations on 8th and 9th reports of Canada, *supra* note 20 at 39 (c).

⁷⁴¹ *Concluding Observations on the 7th and 8th reports of Colombia*, *supra* note 675 at 28(c).

⁷⁴² *Ibid* at 28.

⁷⁴³ *Employment Insurance Act*, SC 1996, c 23 [*Employment Insurance Act*, SC 1996, c 23] at s 152.01.

⁷⁴⁴ *Código de Trabajo*, *supra* note 616 at Ley 100 de 1993, arts. 15(2), 19.

is important for governments to ensure that these services are available for women. In Colombia, the government supports vulnerable, low income mothers with the Community Mothers Program. The program employs women - Community Mothers - dedicated to the care of children within the neighborhoods that they live in. Community Mothers are hired by the government through the Family Wellness Institute (Instituto Colombiano de Bienestar Familiar (ICBF)),⁷⁴⁵ to take care of children, while their mothers are at work.⁷⁴⁶ The program has proven successful in assisting low income mothers returning into the workforce. However, there is discussion about the employment status of Community Mothers, many of whom have endured extensive legal battles to secure their employment rights.⁷⁴⁷ It would be advisable for the Colombian government to build upon the success of the program by recognizing Community Mothers' employment rights and by increasing the number and access of children in the program, as suggested by jurisprudence.⁷⁴⁸ In Canada, the issue of access to affordable childcare is an area of concern by the CEDAW Committee⁷⁴⁹ and remains a priority for federal and provincial governments. Based on Colombia's positive experience with the Community Mothers Program, Canada could consider creating a similar program to support low-income mothers working in the informal sector by providing affordable public childcare in their own neighborhood communities. Programs like these would address two areas of concern by the CEDAW Committee: first, it would provide affordable childcare for women; and second, it would create formal job opportunities for women performing domestic and care work from their homes. Learning from the Colombian experience, it would be vital

⁷⁴⁵ The Community Mothers' Program started as a social volunteer initiative with *Ley 89 de 1988 - Asignación Recursos al Instituto Colombiano de Bienestar Familiar*, *Diario Oficial* 38.635, 29 December 1988 [*Ley 89/1988*] at 89. Their employment was recognized and formalized by *Ley 1607 de 2012 - normas en materia tributaria*, *Diario Oficial* 48.655, 25 December 2012 [*Ley 1607/12*] at 36.

⁷⁴⁶ *Protocolo para la Vinculación Laboral de las Madres Comunitarias y su Afiliación al Sistema Integral de Seguridad Social* (Ministerio de Trabajo, 2014).

⁷⁴⁷ *T-127-2017*, *MP Luis Ernesto Vargas Silva*, 2017 Corte Constitucional de Colombia (available on <http://www.corteconstitucional.gov.co/relatoria/2017/T-127-17.htm>).; *T-508-2015*, *MP Gloria Stella Ortiz Delgado*, 2015 Corte Constitucional de Colombia (available on <http://www.corteconstitucional.gov.co/relatoria/2015/T-508-15.htm>).

⁷⁴⁸ *T-508-2015*, *MP Gloria Stella Ortiz Delgado*, *supra* note 747 at 24.

⁷⁴⁹ *CEDAW Concluding Observations on 8th and 9th reports of Canada*, *supra* note 20 at 38(c).

to provide the Community Mothers with clear employment or labour standards and requirements.⁷⁵⁰

After presenting the differences and similarities in working women's maternity rights in Colombia and Canada, this thesis shows that, despite the success of introducing maternity leave provisions in their domestic legislation; the legal systems implemented to protect working mothers are not enough to completely eliminate pregnancy based discrimination of working women. Indeed, in Canada's case, the CEDAW Committee has expressed concerns in the continued horizontal and vertical occupational segregation; the overrepresentation of women in the informal sector; the underrepresentation of women in managerial positions; and the lack of affordable childcare for working women.⁷⁵¹ All these caused by women's traditional child-raising and care-taking role and responsibilities that remain unbalanced between women and men.⁷⁵² Comparatively, in Colombia's case, the CEDAW Committee has also identified the existence of persistent patriarchal attitudes and deep-rooted stereotypes about women and men's roles and obligations in the society;⁷⁵³ and the continued occupational segregation of women and their overrepresentation in informal jobs with no access to social security protections.⁷⁵⁴ The Committee also indicates that, these issues are locating women in a disadvantaged position in the labour market.⁷⁵⁵ Thus, both countries do not achieve substantial equality for working women in this respect. Furthermore, there seems to be a gap between international standards and domestic laws, mostly in relation to women working in the informal sector, pointing to the impending need for law reform to bridge this gap.

⁷⁵⁰ T-508-2015, MP Gloria Stella Ortiz Delgado, *supra* note 747 at 24.; T-127-2017, MP Luis Ernesto Vargas Silva, *supra* note 747 at 31.

⁷⁵¹ CEDAW Concluding Observations on 8th and 9th reports of Canada, *supra* note 20 at 38 (b)(c).

⁷⁵² *Ibid* at 38.

⁷⁵³ Concluding Observations on the 7th and 8th reports of Colombia, *supra* note 675 at 13.

⁷⁵⁴ *Ibid* at 27.

⁷⁵⁵ *Ibid* at 13.

4.3 The Principles of Equal Pay for Work of Equal Value and Equal Pay for Equal Work

The principle of equal pay of work of equal value and achieving equality of wages and opportunities for working women is also enshrined in international and domestic laws.

Article 23 of the UN Universal Declaration of Human Rights (UDHR)⁷⁵⁶ speaks about the principle of pay equity, stating that “everyone, without discrimination, has the right to equal pay for equal work.”⁷⁵⁷ The UDHR, adopted in 1948, used the term ‘equal pay for equal work’ to mean matching the compensation of women and men performing the same jobs under the same conditions. However, since then, the feminist theory of differentiation has identified the need for equal pay for work of equal value because ‘equal pay for equal work’ overlooks: first, issues of systemic discrimination and gender-based occupational segregation of occupation;⁷⁵⁸ second, the fact that ‘female’ jobs are generally remunerated at a lower rate than ‘male’ jobs; and third, that the law should be analysed using social reality as a guide for each individual case.⁷⁵⁹

In 1951, recognizing the issues with the principle of equal pay for equal work in the UDHR, the International Labour Organization further developed the principle of ‘equal pay for equal work’ into ‘equal pay for work of equal value’, which was depicted in the Equal Remuneration Convention, No. 100,⁷⁶⁰ and its accompanying Equal Remuneration Recommendation No. 90.⁷⁶¹ This fundamental convention requires ratifying countries to ensure the application of the principle of equal remuneration for men and women for work of equal value. Convention No. 100 addressed the issues of systemic discrimination and the undervaluing of female occupations by crafting a system of comparisons needed

⁷⁵⁶ UDHR, *supra* note 501.

⁷⁵⁷ *Ibid* at art 23(2).

⁷⁵⁸ See Marie-Thérèse Chicha & ILO InFocus Programme on Promoting the Declaration on Fundamental Principles and Rights at Work, *A comparative analysis of promoting pay equity: models and impacts* (Geneva: ILO, 2006) at 5.; Cynthia E Gitt & Marjorie Gelb, “Beyond the Equal Pay Act: Expanding Wage Differential Protection Under Title VII” (1976) 8 Loy U Chi LJ 723 at 725.

⁷⁵⁹ Chicha & ILO InFocus Programme on Promoting the Declaration on Fundamental Principles and Rights at Work, *supra* note 758; Scales, *supra* note 562 at 1387.

⁷⁶⁰ *Convention (No. 100) concerning equal remuneration for men and women workers for work of equal value*, 29 June, 1951, 2181 UNTS 165.

⁷⁶¹ *Recommendation (No.90) concerning equal remuneration recommendation*, 29 June 1951, ILO Rec. 34th Sess [ILO Recommendation No. 90].

to establish the real value of work, based on characteristics different from sex.⁷⁶² The Convention entry into force in May 23, 1953 and it was ratified by Canada on November 16, 1972 and by Colombia in June 7, 1963.⁷⁶³ It is currently in force for both countries. Following the enactment of Convention No. 100, in 1958, the ILO adopted the Discrimination (Employment and Occupation) Convention No. 111,⁷⁶⁴ together with its Discrimination (Employment and Occupation) Recommendation No. 111.⁷⁶⁵ This Convention was ratified by Canada in 1964 and by Colombia in 1969, and it calls on State parties to “promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.”⁷⁶⁶ The enactment of these two fundamentals conventions go to show that unequal wages represent a form of discrimination against women; as such, State parties should introduce changes into their domestic legal systems to eliminate pay inequity and achieve equality in wages for working women.

The 1979 Convention on the Elimination of All forms of Discrimination Against Women obligates State parties, such as Colombia and Canada, to take all appropriate measures, including modifying legislation, to ensure that gender equality is achieved by removing barriers and ensuring equal access to, and equal opportunities in education, political life, health and employment.⁷⁶⁷ Specifically article 11(d) of CEDAW states that:

States parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: ...

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.

⁷⁶² *Supra* note 259 at 34, 38.

⁷⁶³ “Convention (No. 100) concerning equal remuneration for men and women workers for work of equal value, Ratifications”, online: *UNTC* <https://treaties.un.org/Pages/showDetails.aspx?objid=080000028014f5a2&clang=_en>.

⁷⁶⁴ *ILO Convention No. 111*, *supra* note 499.

⁷⁶⁵ *ILO Recommendation No. 111*, *supra* note 500.

⁷⁶⁶ *ILO Convention No. 111*, *supra* note 499 at art.3.

⁷⁶⁷ *CEDAW*, *supra* note 236.

The principle of equal pay for work of equal value is also portrayed in article 7 of the International Covenant on Economic, Social and Cultural Rights:

States parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.⁷⁶⁸

The UN also recognised, in its Sustainable Development Goals for 2030, the importance of this principle as the basis for the development of any successful economic system that fosters the effective accomplishment of women within the paid workforce.⁷⁶⁹

To meet the obligations contained in these international agreements, both Canada and Colombia have enacted domestic legislation to implement equal pay for equal work and equal pay for work of equal value. However, to date neither Canada nor Colombia have fully achieved this important goal.⁷⁷⁰

To address the issue of gender inequality and achieve international standards, Canada's governments have implemented extensive human rights,⁷⁷¹ labour,⁷⁷² employment,⁷⁷³ and pay equity,⁷⁷⁴ legislation at federal, provincial and territorial levels. Canada has taken a research approach to the issue by organizing several studies and research initiatives, resulting in numerous reports and recommendations to eliminate sex discrimination and

⁷⁶⁸ ICESCR, *supra* note 494.

⁷⁶⁹ *Transforming our World: the 2030 Agenda for Sustainable Development*, *supra* note 705.

⁷⁷⁰ Melissa Moyer, *Women in Canada: A Gender-based Statistical Report* (Statistics Canada, 2017) at 26.; *Informes Especiales Mercado Laboral: Trimestre Móvil febrero - abril 2017* (Bogotá, Colombia: Departamento Administrativo Nacional de Estadística (DANE), 2017) at 4.

⁷⁷¹ *The Constitution Act 1982*, *supra* note 541. *Canadian Human Rights Act*, RSC 1985, c H-6, *supra* note 535.; *Alberta Human Rights Act*, RSA 2000, c A-25.5, *supra* note 540.; *Human Rights Act*, RSY 2002, c 116, *supra* note 540.; *Human Rights Code*, RSBC 1996, c 210, *supra* note 540.; *Human Rights Code*, RSO 1990, c H.19, *supra* note 540.; *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1, *supra* note 540.

⁷⁷² *Equal Wages Guidelines*, 1986, SOR/86-1082 [*Equal Wages Guidelines*, 1986, SOR/86-1082].

⁷⁷³ *Employment Equity Act*, SC 1995, c 44, *supra* note 542. *Employment Standards Act*, 2000, SO 2000, c 41, *supra* note 737.; *The Employment Standards Code*, CCSM c E110, *supra* note 737.

⁷⁷⁴ *Pay Equity Act*, CQLR c E-12.001 [*Pay Equity Act*, CQLR c E-12.001].; *Pay Equity Act*, RSNS 1989, c 337 [*Pay Equity Act*, RSNS 1989, c 337].; *Pay Equity Act*, RSO 1990, c P.7 [*Pay Equity Act*, RSO 1990, c P.7].; *Human Rights Code*, RSBC 1996, c 210, *supra* note 540.

achieve pay equity for women in employment.⁷⁷⁵ These studies resulted in recommendations on pay equity, but the governments have been slow in responding to these recommendations. One of the most pressing issues as identified in the Human Rights Commission's *Time for Action* Report, is the limited reach of the claims-based pay equity legislation currently in place.⁷⁷⁶ The report recommended changes to the current system, such as: introducing legislative changes to reflect a more proactive approach of pay equity legislation at a federal level; achieving pay equity through a collaborative approach amongst employers, government and unions; eliminating wage discrimination by changing negative gender stereotypes of feminine jobs; and simplifying pay equity rules.⁷⁷⁷ These changes harmonize with recommendations made by the ILO and UN for State parties to achieve pay equity. However, the suggestions have not been implemented in a substantive sense and, as a result, Canada fails to achieve its international obligations regarding pay equity.⁷⁷⁸ Furthermore, and as explained in the introduction of this chapter, comments and recommendations from the CEDAW Committee also point out to a slow development of Canada on this important subject.⁷⁷⁹

Colombia's approach to achieving pay equity has been different than that of Canada, mainly because of its centralized civil code legal system. Indeed, Colombia has enacted a complex system of laws and quotas to achieve its international obligations.⁷⁸⁰ However, this approach has not been successful either in achieving the evasive goal of equality for women.⁷⁸¹

⁷⁷⁵ See Abella, *supra* note 602.; *Time for action: special report to Parliament on pay equity* (Ottawa: Canadian Human Rights Commission, 2001).; *It's time to act - Report of the special committee on pay equity* (Ottawa: House of Commons, 2016).

⁷⁷⁶ *Supra* note 761 at 11.

⁷⁷⁷ *Ibid* at 17,18.

⁷⁷⁸ The Canadian wage gap is increasing as reported in the 2016 Global Gender Gap Report, where Canada ranked in 35th place amongst 144 countries, in the global gender gap index; and 36th in the economic participation and opportunity category. Canada has developed negatively from 2006 when it ranked 14th for the global gender gap, and 10th in the economic and participation category. See *Global Gender Gap Report 2016*.

⁷⁷⁹ CEDAW Concluding Observations on 8th and 9th reports of Canada, *supra* note 20 at 37,38.

⁷⁸⁰ *Constitución de Colombia*, *supra* note 31.; *Código de Trabajo*, *supra* note 616.; *Ley 581/2000*, *supra* note 633.; *Ley 1413/10*, *supra* note 712.; *Ley 1429/2010*, *supra* note 637.; *Ley 1257/08*, *supra* note 631.; *Ley 82 de 1993 - Normas para apoyar de manera especial a la mujer cabeza de familia*, *Diario Oficial* 41.101, 3 noviembre 1993 [*Ley 82/93*].

⁷⁸¹ The 2016 Global Gender Gap Report ranks Colombia in 39th place within 144 countries in the global gender gap index, and 28th in the economic participation and opportunity category. As per the same index,

Another important difference between the Canadian and Colombian approaches to the subject of pay equity is that, Canada has implemented the principle of equal pay for work of equal value and Colombia has adopted pay equity as equal pay for equal work.⁷⁸²

Indeed, in Canada, pay equity legislation relies on employers to implement changes into their workplaces to achieve pay equity,⁷⁸³ and imposes the implementation of a complex process of gender neutral comparisons to adjudicate value to the work and establish equality in compensation.⁷⁸⁴ On the other hand, Colombia has established a proportionality test based on responsibilities, location, and hours of work.⁷⁸⁵ However, despite these laws, both countries do not actually achieve equality of wages for working women. Indeed, in Canada's case, the CEDAW Committee reported its concerns about:

The persistent gender wage gap, in both the public and private sectors, which adversely affects women's career development and pension benefits, the lack of effective legislation on the principle of equal pay for work of equal value at the federal level, even in the public sector, given that the Public Sector Equitable Compensation Act (2009) has delivered no results, and the lack of such legislation in the private sector in most provinces and territories, as repeatedly noted by ILO.⁷⁸⁶

In Colombia's case, the same Committee also reported concerns:

It notes the adoption of Law No. 1496 (2011) and is concerned that it only partially enshrines the principle of equal pay for work of equal value. It is also concerned at the high female unemployment rate, the considerable pay gap between women and men and the occupational segregation of women. It is further concerned that the large majority of the female working population is engaged in the informal labour sector, hence having no access to social security benefits.⁷⁸⁷

Colombia has developed negatively from 2006 when it ranked 22nd for the global gender gap but has improved in the economic and participation category rank of 39th in 2006. See *supra* note 778.

⁷⁸² The Constitutional Court has interpreted the Constitutional right at equal pay for equal work and as such has created a proportionality test based on characteristics such as type and place of work, to establish appropriate remuneration amongst employees. See *T-833-2012, MP Luis Ernesto Vargas Silva*, 2012 Corte Constitucional de Colombia (available on <http://www.corteconstitucional.gov.co/relatoria/2012/T-833-12.htm>).

⁷⁸³ *Supra* note 761 at 12.

⁷⁸⁴ The complex language of the law requires the use of consultants and experts to examine a system of occupational comparisons. These experts might be available to big and public corporations but not to small employers adding a burden to their business. *Ibid* at 11,12.

⁷⁸⁵ *T-833-2012, MP Luis Ernesto Vargas Silva*, *supra* note 782.

⁷⁸⁶ *CEDAW Concluding Observations on 8th and 9th reports of Canada*, *supra* note 20 at 38(a).

⁷⁸⁷ *Concluding Observations on the 7th and 8th reports of Colombia*, *supra* note 675 at 27.

Overall, this research shows that, despite two very different approaches to implementing the same goal, neither Colombia nor Canada has succeeded in achieving pay equity. However, the ILO has recognized that Canada and Colombia are not alone in failing to achieve this important standard and have declared it a global problem.⁷⁸⁸ The ILO also recognizes that the issue tends to be caused by several complex, interrelated factors,⁷⁸⁹ however numerous elements associated with the wage gap remain unidentified. These unidentified factors are often associated to systemic discrimination, based on negative stereotypes about women's roles and obligation in their families and in society.⁷⁹⁰

The issue of systemic discrimination against women is reflected in both Canadian and Colombian workplaces, fostering work cultures with normalized discriminatory practices.⁷⁹¹ To achieve equality for women in employment, there is a need to change the Canadian and the Colombian work cultures to eliminate systemic discrimination based on negative stereotypes of women's roles (productive and reproductive), responsibilities and capabilities in the workplace.⁷⁹² Eliminating systemic discrimination will welcome a more diverse work culture,⁷⁹³ where norms and policies are reviewed and modified to conform to women's questions, needs and experiences.⁷⁹⁴

After establishing the gaps in the systems enacted by Canada and Colombia to achieve equality of wages for women, this research shows that both countries have established

⁷⁸⁸ *Supra* note 259 at 16.

⁷⁸⁹ Such as segregation and maternity responsibilities See *Ibid* at 16.

⁷⁹⁰ *Ibid*.

⁷⁹¹ CEDAW Concluding Observations on 8th and 9th reports of Canada, *supra* note 20 at 38.; *Closing the Gender Wage Gap: A Background Paper* (Ministry of Labour, 2015).; *Concluding Observations on the 7th and 8th reports of Colombia*, *supra* note 675.; Ministerio de Trabajo, ed, *Programa Nacional de Equidad Laboral con Enfoque Diferencial de Genero* (Ministerio de Trabajo, 2013).

⁷⁹² Ministerio de Trabajo, *supra* note 791.; Special Committee on Pay Equity, *supra* note 775.

⁷⁹³ It is important to note that women who are members of indigenous, visible minorities, disabled, or immigrants or refugees also face additional intersectional barriers to achieving pay equity. Women from these groups will experience higher levels of disparate treatment when joining the paid labour force, including lower wages than their male and female colleagues. Although intersectionality is an important factor to consider when analysing women's rights, it exceeds the scope of this thesis, however it leaves the door open to further examination. See, Avtar Brah & Ann Phoenix, "Ain't IA woman? Revisiting intersectionality" (2013) 5:3 J Int Womens Stud 75.

⁷⁹⁴ Baer, *supra* note 583 at 316.; Scales, *supra* note 562 at 1381.

different approaches, however, there are also some similarities such as the claims-based approach, where women experiencing discrimination need to file a claim before the federal or a provincial Human Rights Commission in Canada or before the Constitutional Court in Colombia. As reported by the federal Human Rights Commission, the claims-based approach hinders the process of achieving equality for women.⁷⁹⁵ Overall, this research shows that both Canada and Colombia need proactive pay equity legislation to address the issues related to the principle of equal pay for work of equal value.

On the other hand, other pieces of legislation have been proven their effectiveness in decreasing, but not eliminating, the gender wage gap. Norms such as established minimum wage and collective bargaining, have been successful in leveling the income of employees based on gender-neutral characteristics.⁷⁹⁶ However, many working women perform in the informal, domestic and self-employed sector⁷⁹⁷ and do not have access to these legal protections. This goes to show the need of extending the reach of labour and employment protections to Canadian and Colombian women working in these areas.

After presenting the differences and similarities in women's pay equity rights in Colombia and Canada, this thesis shows that the laws protecting the equality of pay principle do not lead to substantive equality for working women. Furthermore, there seems to be a gap between international standards and domestic laws, pointing to the impending need for law reform to bridge this gap.

4.4 Discrimination against Women in the Workplace

This thesis has referred to several factors that have an impact in the equality rights of women in the workplace. It has also explained that, many of these factors are complex and often interrelated. One of the issues that tends to be present as cause and consequence of all the other factors is the issue of discrimination.

⁷⁹⁵ CHRC, *supra* note 761 at 12,13.

⁷⁹⁶ World Employment and Social Outlook, *supra* note 259 at 34,38. *Beijing Declaration*, *supra* note 516 at 71.; *Global wage report, 2016/17: wage policies in times of crisis* (Geneva: International Labour Office, 2016) at 2,21,24,25.

⁷⁹⁷ It is important to note that women working in the professional sector, such as business owners, are self-employed, however these occupations are not part of the informal sector *per se*.

Discrimination has been comprehensibly addressed by the international community as part of a complex body of international treaties and recommendations. Certainly, articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights,⁷⁹⁸ recognize the right to work, the opportunity to earn a living and the right to just and favorable work conditions without discrimination. Women have been searching to exercise these rights by joining the workforce, encountering numerous barriers such as unfair wages and harassment. To eliminate these barriers, international organizations such as United Nations and the International Labour Organization have created agreements, conventions and programs with the purpose of achieving gender equality and eliminating discrimination against working women. Examples of these instruments are: ILO Convention No.111 concerning discrimination in respect of employment and occupation (ratified by Canada on November 26, 1964 and by Colombia on March 4, 1969), and ILO Convention No.156 concerning equal opportunities and equal treatment for male and female workers with family responsibilities (this convention was not ratified by Canada nor Colombia). In addition to the ILO's conventions, Canada and Colombia have ratified the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁷⁹⁹ The CEDAW was enacted with the purpose of eliminating discrimination, and achieving equality for women and girls at a global level. It also recognized that women's rights are human rights and that they share the same general principles: universality, inalienability equality, non-discrimination, indivisibility, interdependence and interrelatedness. CEDAW created an international legal structure to protect women and girls from discrimination.⁸⁰⁰ Additionally, the international community has referred to the importance of eliminating discrimination against women in many opportunities, for example, in the 1975 Mexico City World Plan of Action for the implementation of the objectives of the international women's year⁸⁰¹ and in the

⁷⁹⁸ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS, CAN TS 1976 No.46.

⁷⁹⁹ *CEDAW*, *supra* note 236. (Canada ratified CEDAW on December 10, 1981 and Colombia in January 19, 1982)

⁸⁰⁰ Christine Chinkin & Marsha A. Freeman, *supra* note 508 at 6.

⁸⁰¹ States representatives recognized that, the wellbeing of women is an area that should concern society as a whole, pointing to the need for governments to introduce changes to domestic laws with the purpose of improving women's economic, political and social situation. See *Report of the World Conference of the International Women's Year*, UNOR, 1976, UN Doc/E/Conf.66/34, 199 at 2.

outcome document of the UN Fourth World Conference on Women, the 1995 Beijing Declaration and Platform for Action.⁸⁰²

Despite the increased international enthusiasm to eliminate discrimination, the goal has proven difficult to achieve at the domestic level. Indeed, Canadian and Colombian women have historically performed unpaid and undervalued domestic work, taking care of their families and homes for the past century. According to feminist scholars, women's roles and responsibilities are dictated by an ideological organizational structure, referred to as the private/public divide, denoting "the ideological division of life into apparently opposing spheres of public and private activities and public and private responsibilities."⁸⁰³ Childcare and domestic work, usually performed by women, belongs to the private sphere of families and, as such, it is not remunerated nor is regulated by labour and employment legislation. On the other hand, socio-cultural norms tend to view men as the breadwinners for the household and their work is placed in the public sphere, hence formally protected by legislation and remunerated.⁸⁰⁴ These deeply-rooted social roles and gender stereotypes foster systemic discrimination that is normalized by culture, thus, difficult to identify and eliminate. Indeed, the gendered work aspect of the public/private divide reproduces itself within each of the two spheres, with women performing "women's work" that has been historically undervalued in each sphere.⁸⁰⁵ When these gender stereotypes find their way into the workplace, they foster a male-created environment, prone to discrimination and harassment against working women. These stereotypical gender roles are a common global issue, and Colombia and Canada are not the exception.⁸⁰⁶

The obligations contained in CEDAW require State parties to enact any appropriate measures at the domestic level to prohibit all forms of discrimination against women. This obligation provides State parties with flexibility in determining the best way to

⁸⁰² The Beijing declaration identified twelve areas for action to achieve equality, development and peace. One of these areas is the women and the economy, addressing the important issues of women's equality in their economic activities. See *Beijing Declaration*, *supra* note 516.

⁸⁰³ Boyd, *supra* note 521.

⁸⁰⁴ *Ibid* at 163.

⁸⁰⁵ *Ibid* at 166.

⁸⁰⁶ *Supra* note 259 at 3.

achieve CEDAW's goals within their own legal systems; however, the State party should be able to justify the appropriateness of the tools it has chosen and demonstrate results.⁸⁰⁷ To follow-up with its international responsibilities, both Canada and Colombia have developed legislation to effectively protect the rights of working women.

To achieve this goal, Canada has enacted federal, provincial and territorial legislation to regulate workplaces and to ensure that the discrimination against women is effectively eliminated. At a federal level, Canadian workers are protected from discrimination by: the Canadian Charter of Rights and Freedoms;⁸⁰⁸ the Canadian Employment Equity Act;⁸⁰⁹ and the Canadian Human Rights Act.⁸¹⁰ Anti-discrimination legislation is also enacted at a provincial level. Although federal and provincial anti-discrimination legislation have differences, most workers are protected from discrimination based on certain personal characteristics such as nationality, place or ethnic origin, race, ancestry, colour, disability, religion, creed, political belief, association, sex, sexual orientation, pregnancy, age, marital and family status.⁸¹¹ Certainly, Canada has enacted extensive legislation at both the provincial and federal level to protect women from discrimination in the workplace. However, and as explained by Susan Boyd, legislation alone is insufficient to eliminate all acts of discrimination against women in the workplace. It is also necessary to initiate awareness of issues that represent a breach of women's human rights, such as biases and stereotypes about women's roles and responsibilities.⁸¹² Furthermore, to achieve equality, it is imperative that governments address the systemic

⁸⁰⁷ Chinkin & Freeman, *supra* note 508 at 9.

⁸⁰⁸ *Canadian Charter of Rights and Freedoms Examination Regulations, SOR/85-781 [Canadian Charter of Rights and Freedoms Examination Reg].*

⁸⁰⁹ The Canadian Employment Equity Act, was adopted to increase and protect the participation of women, people with disabilities, Aboriginal peoples and visible minorities in employment activities.⁸⁰⁹ The participation of members of the four designated groups is protected by encouraging employers to remove barriers and provide reasonable accommodations *Employment Equity Act, SC 1995, c 44, supra* note 542.

⁸¹⁰ The Canadian Human Rights Act, differs from the Canadian Employment Equity Act by promoting equal opportunity and prohibiting discrimination based on personal characteristics such as: sex, ethnicity, disability or religion. See *Canadian Human Rights Act, RSC 1985, c H-6, supra* note 535. at c (h) to (v), s 5 (1).

⁸¹¹ For example, in Ontario, the Human Rights Code, enacted in 1962, protects individuals from discrimination based on protected grounds and in a protected social area, such as accommodations (housing); contracts; employment; goods, services and facilities; and membership in unions, trade and/or professional associations. *Human Rights Code, RSO 1990, c H.19, supra* note 540.

⁸¹² Boyd, *supra* note 521.

nature of discrimination rooted in patriarchy and social/cultural patterns of conduct, as well as the elimination and transformation of society gender relations.⁸¹³

In Colombia, the Political Constitution adopted the “constitutional corpus” principle,⁸¹⁴ which incorporates some human rights international agreements into the legal system, immediately after ratification. Also, domestic legislation needs to be harmonized with the rights and principles contained in the Constitution, including those that are part of the “constitutional corpus”. Any norm that is deemed to go against the constitutional mandate is considered inapplicable, and departures from the legal system, if so decided by the Constitutional Court of Colombia. The Political Constitution refers to the rights of equality in its article 13.⁸¹⁵ This article, protects the principle that all persons should have equal rights, and prohibits any form of discrimination. Article 13 also states that all persons are born free and equal under the law and have the same rights, liberties and opportunities despite their sex, race, national and family origin, language, religion and political or philosophical affiliation. Furthermore, it contains the responsibility of the government to achieve effective and real equality by implementing temporary affirmative action, when necessary, to protect groups that have been historically oppressed or discriminated against.⁸¹⁶ The constitutional protection of equality refers specifically to women in its article 43, which expressly prohibits any form of discrimination against women.⁸¹⁷

To further regulate the Constitutional principles and to ensure the effective protection of equality rights for working women, Colombia has enacted a complex system of laws, regulations and norms. Some examples of these are; the Labour Code,⁸¹⁸ Law 1257 of

⁸¹³ Chinkin & Freeman, *supra* note 508 at 9.

⁸¹⁴ By virtue of the constitutional corpus principle, rules and regulations contained in international human rights treaties, ratified by Colombia, such as ILO’s conventions and CEDAW, form a fundamental part of the Political Constitution and are immediately integrated into the domestic legal system. Also, part of the “constitutional corpus” are the decisions of international organizations on human rights such as the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, the Human Rights Committee and the Committee on the Elimination of Discrimination Against Women. See Uprimny, *supra* note 618 at 22..

⁸¹⁵ *Constitución de Colombia*, *supra* note 31 at 13.

⁸¹⁶ *Ibid.*

⁸¹⁷ *Ibid* at 43.

⁸¹⁸ *Código de Trabajo*, *supra* note 616.

2008 against gender violence,⁸¹⁹ Law 823 of 2003 protecting equality of employment conditions and opportunities,⁸²⁰ Law 581 of 2000 on the political participation of women in politics,⁸²¹ Law 731 of 2002 on the protection of rural women,⁸²² Law 861 of 2003, the protection of property of female heads of family,⁸²³ Law 1010 of 2006 on harassment at work,⁸²⁴ and Law 1429 of 2010 on caretakers.⁸²⁵ These laws have implemented a claims-based approach system – like in Canada - where women, that have been victims of discrimination, must file legal claims and go through legal proceedings to see their rights protected.⁸²⁶ Another issue with the way discrimination legislation is currently enacted in Colombia, is that it tends to be geared to the prevention of acts of discrimination rather than providing remedy to the victims, and it places the responsibility of achieving equality and eliminating discrimination mainly on employers.⁸²⁷ The claims-based approach and the preventive nature of legislation, places an enormous weight on victims to see their rights protected.

Litigation has also been important in both, Canada and Colombia, to develop and provide legal interpretation to the issue of discrimination against women in the workplace.

In Canada, the Supreme Court has placed the issue of sexual harassment within the realm of human rights legislation mainly with its decision of two key cases: *Robichaud v. Canada Treasury Board*,⁸²⁸ and *Janzen v. Platy Enterprises Ltd.*⁸²⁹ In *Robichaud*, the Court found that, under the Canadian Human Rights Act, a corporation can be liable for the unauthorized discriminatory acts of its employees in the course of their employment.⁸³⁰ In *Janzen*, the Supreme Court explained that sexual harassment is a form

⁸¹⁹ Ley 1257/08, *supra* note 631 at 125.

⁸²⁰ Ley 823/03, *supra* note 632.

⁸²¹ Ley 581/2000, *supra* note 633 at 58.

⁸²² Ley 731/02, *supra* note 634.

⁸²³ Ley 861/03, *supra* note 635 at 861.

⁸²⁴ Ley 1010/06, *supra* note 636.

⁸²⁵ Ley 1429/2010, *supra* note 637.

⁸²⁶ *Supra* note 775.; Nancy Holmes & Parliamentary Research Branch, *Human Rights Legislation and the Charter: A Comparative Guide* (Government of Canada Publications, Doc MR-102E, 1992).

⁸²⁷ See note 775 at 11, 27.

⁸²⁸ *Robichaud*, *supra* note 588.

⁸²⁹ *Janzen*, *supra* note 582..

⁸³⁰ The Court stated that this liability is purely statutory, though it serves the purpose somewhat similar to that of vicarious liability in tort, by placing responsibility for an organization on those who control it and

of discrimination that attacks the dignity and self-respect of the victim as an employee and as a human being.⁸³¹ Furthermore, the Court stated that, discrimination does not require uniform treatment of all members of a particular group: discrimination on the basis of sex occur where there is a “practice or attitude which had the effect of limiting the conditions of employment of, or the employment opportunities available to employees on the basis of a characteristic related to gender”.⁸³²

The Supreme Court of Canada has further developed the rights of working women by establishing a set of rules and tests that changed the way human rights cases are decided. Indeed, it has issued numerous iconic decisions with respect to women’s rights in the workplace. For example, the 1989 judgment in *Brooks v. Canada Safeway Ltd.*,⁸³³ overturned the decision in *Bliss* by stating that pregnancy cannot be separated from gender and that discrimination based on pregnancy is a form of sex discrimination because it is a biological fact that only women have the capacity to become pregnant.⁸³⁴ The Court also addressed the issue of systemic discrimination by explaining that discrimination occurs when any condition of employment creates an unfair disadvantage for women, even in the absence of intent from the employer to discriminate.⁸³⁵ Another important Supreme Court decision is the 1987 *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission) and Action Travail des Femmes*.⁸³⁶ In this case, the Court upheld a human rights tribunal finding, where an employer’s recruitment, hiring and promotion practices had amounted to systemic discrimination by creating barriers for women to have access to occupations different from those traditionally held by women. Later, in 1999, in *B.C. (Public Service Employee Relations Commission) v. B.C. Government Service Employees’ Union (Meiorin)*,⁸³⁷ the Supreme Court established a unified test to determine if a violation of human rights legislation can be justified as a

are in position to prevent or take effective remedial action to remove undesirable conditions. See *Robichaud*, *supra* note 588 at par. 12.

⁸³¹ *Janzen*, *supra* note 582.

⁸³² *Ibid.*

⁸³³ *Brooks*, *supra* note 566.

⁸³⁴ *Ibid.* at par 2.

⁸³⁵ *Ibid.* at par 3.

⁸³⁶ *CN v. Canada (Canadian Human Rights Commission)*, *supra* note 569.

⁸³⁷ *Meiorin*, *supra* note 571.;

bona fide occupational requirement (BFOR).⁸³⁸ This decision represented an important step forward in the methods used by the Court when deciding human rights disputes, changing the previous bifurcated analysis because it was artificially established and inadequate to effectively protect equality rights.⁸³⁹

In Colombia, issues of discrimination against working women, are placed within the human rights jurisdiction, as such, most cases are decided by the Constitutional Court and not the Supreme Court of Justice. Placing cases of discrimination within the human rights jurisdiction, fast-tracks the legal process by offering victims the option of using the “tutela” procedure, however it also leaves victims of discrimination and harassment without the options of claiming remedies in the civil jurisdiction.⁸⁴⁰

In its decisions, the Constitutional Court of Colombia, has implemented important legal tools that have forwarded women’s rights. The Court recognizes that effective equality is a right defined by its formal, substantive definition in the law as well as by the practical material application and expression of these rights by individuals.⁸⁴¹ As such, the government must guarantee the real and effective protection of equality rights and the protection against any form of discrimination based on sex and/or gender.⁸⁴² The government also has a responsibility to provide special protection to groups that have been historically oppressed and discriminated, as such adjudicators should take temporary affirmative action when needed to provide remedy for the victims.⁸⁴³

⁸³⁸ The “Meiorin Test,” requires an employer to demonstrate that: a) that the standard was adopted for a purpose rationally connected to the performance of the job; b) honestly believe the standard is necessary to fulfill the legitimate, work-related purpose; and c) show the standard is reasonably necessary to the accomplishment of the legitimate, work-related purpose, hence must prove that it is impossible to accommodate workers without undue hardship to the employer. *Ibid.* at par. 50.

⁸³⁹ Before *Meiorin*, human rights disputes could be decided using one of two methods: as direct discrimination as established in the decision in *Human Rights Commission v. Borough of Etobicoke*, or as adverse effects discrimination as per the judgment in *O’Malley v. Simpson-Sears*. See *Ibid.* at par 26.; *Ontario Human Rights Commission v. Etobicoke*, 1980 CanLII 57 (ON CA), <http://canlii.ca/t/1vm72>; *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 SCR 536, 1985 CanLII 18 (SCC), <http://canlii.ca/t/1ftxz> [O’Malley].

⁸⁴⁰ Demeyere, *supra* note 594.

⁸⁴¹ Uprimny, Molano & Guzmán, *supra* note 598.

⁸⁴² *T-878/14*, *supra* note 655 at s. 1; *Constitución de Colombia*, *supra* note 603 at arts. 13, 43, 53.

⁸⁴³ *C-543/10*, *supra* note 665 at s 5.1.6; *C-410/94*, *supra* note 657 at VII (c); *T-230/94*, *supra* note 667 at s II A (c.3).

The Constitutional Court, through decisions such as those in *C-371/00*; *T-494/92*; *C-125/03*; *C-410/94*; *C-964/03*; and *T-878/14*, has also created important tools for the interpretation of the law in the adjudication of cases of discrimination against women.⁸⁴⁴

The Court identified that main cause for systemic discrimination in Colombia as the presence of gender-based stereotypes. Indeed, in decision *T-878/14*, a woman was terminated from her employment as an administrative assistant for a university because she was victim of domestic violence from her boyfriend, who was a student of the university, and she reported the case to the police.⁸⁴⁵ The Court stated that women have been given a reproductive role by society and this role has created the perception that they should also be obedient and reserved.⁸⁴⁶ These negative stereotypes about women's roles and responsibilities are embedded in the society and they have negative consequences for women in all areas including work.⁸⁴⁷ The Court recognized that the legal system in Colombia was created to satisfy the needs of men and that, as such, it is sometimes blind to the experiences of women.⁸⁴⁸ In this case, the Court insists that cases of discrimination and violence against women happen because the government and the society have failed their obligation to prevent these types of acts.⁸⁴⁹

The elements used by the Constitutional Court of Colombia to identify and decide cases of discrimination are: first, the recognition of the history of gender-based discrimination and oppression against women in all aspects of life including work and economic activities;⁸⁵⁰ second, the substantive and effective recognition, protection and promotion of equality rights for women;⁸⁵¹ and third, the creation of dogmatic tools, such as the

⁸⁴⁴ *C964/03*, *supra* note 643.; *C-371/00*, *supra* note 648.; *T-494/92*, *supra* note 653.; *C-125/03*, *supra* note 666.; *C-410/94*, *supra* note 657.; *T-878/14*, *supra* note 669.

⁸⁴⁵ *T-878/14*, *supra* note 669 at 1.

⁸⁴⁶ *Ibid* at 7(III).

⁸⁴⁷ *Ibid*.

⁸⁴⁸ *Ibid*.

⁸⁴⁹ *Ibid* at 8.

⁸⁵⁰ The Court often performs a deep analysis of the personal characteristics of the victim, within a context of historical exclusion, oppression and discrimination environment. This analysis is a key element of the Court decision and recognizes the issue of systemic discrimination. See Uprimny, Molano & Guzman, *supra* note 612.; *C-371/00*, *supra* note 648.

⁸⁵¹ The Court has recognized the importance of valuing gender pluralism to achieve effective equality for women using two main strategies: firstly, the recognition of the importance of the roles that women have as part of the Colombian culture and society and the mandate of government and of the society to value and respect these roles. See, *T-494/92*, *supra* note 653.; and secondly, to recognize that women and men are

“suspicious criteria” test, to help judges recognize systemic discrimination.⁸⁵² The Court also considers that the only way to achieve equality is to level the legal ground for women by implementing temporary affirmative action, or positive discrimination, to correct inequality, even if it creates disparity for members of privileged groups.⁸⁵³ However, there is always the possibility of abuse when using positive discrimination in the name of equality. To avoid these risks, the Court has established a proportionality principle⁸⁵⁴ and a test to decide if affirmative action is adequate and necessary.⁸⁵⁵ The Court has also stated that, even though differential treatment is acceptable to provide remedy to marginalized groups, positive discrimination actions should be temporary and should cease after effective equality is reached.⁸⁵⁶

This research shows that, like Canada’s approach, Colombia has also implemented a claims-based instead of a proactive approach, where women who have been discriminated against in the workplace must file claims and go through a lengthy legal process to see their rights observed and respected. Another similarity in the approach adopted by Colombia and Canada is that they both have located the issue of workplace discrimination against women within the human rights jurisdiction limiting the action of victims who seek remedies within the civil jurisdiction.⁸⁵⁷ Also, Canada and Colombia’s legislation considers temporary, positive discrimination as a way to provide remedy and

different by nature, and that due to a patriarchal culture, systemic discrimination has been normalized by society and women are more often victims of discrimination and exclusion. See *C-410/94*, *supra* note 657.

⁸⁵² The suspicious criteria concept was created by the Court, recognizing systemic discrimination often normalized by the workplace. To configure suspicious criteria, the judge should analyze the presence of the following elements: firstly, is the distinction, exclusion or restriction based on a permanent personal characteristic of an individual, that cannot be separated by that individual’s will without changing its identity; secondly, has this personal characteristic been historically perceived as inferior by society; and thirdly, the personal characteristic does not constitute per se criteria to establish an equitable and rational process of distributing goods, rights or social burdens. In the presence of suspicious criteria, discrimination is legally presumed shifting the burden of proof to the defendant. See *C964/03*, *supra* note 643 at 3.2.

⁸⁵³ Positive discrimination” is needed to achieve effective equality and to protect minorities and groups that have historically excluded and oppressed See *C-410/94*, *supra* note 657.; *C964/03*, *supra* note 643.

⁸⁵⁴ *C-125/03*, *supra* note 666. The Court defines the proportionality principle as the adjustment of the remedy to the damage caused by the unlawful action.

⁸⁵⁵ *Ibid.*; affirmative action, should be implemented only if: i) its purpose is valid and protected by the Constitution; ii) the differential treatment is needed to achieve the purpose; iii) the means used are needed to achieve the purpose; and iv) the differential treatment must be proportional *stricto sensu*.

⁸⁵⁶ *C964/03*, *supra* note 643 at 3.2(19).

⁸⁵⁷ Demeyere, *supra* note 594.; Uprimny, Molano & Guzmán, *supra* note 598.

prevent cases of discrimination against women, even if it creates disparity of treatment for men.⁸⁵⁸

This thesis shows that there is an impending need, for Colombia and Canada, of introducing changes into their domestic law systems to better prevent, protect and promote women's anti-discrimination rights. Examples of these legislative changes are: firstly, shifting from a claims-based approach to proactive legislation;⁸⁵⁹ secondly, identify and eliminate negative stereotypes about women's roles and responsibilities, and the value of their work and contributions to their families and the community where they live;⁸⁶⁰ and thirdly, provide victims with contractual legal remedies in cases of discrimination.⁸⁶¹ Also, this thesis research presents a vast number of legal initiatives at international and domestic level, enacted to eliminate discrimination against working women. Recognizing that discrimination is a current issue for many working women, is a step in the right direction and some of the implemented strategies, such as anti-discrimination legislation and collective bargaining, have proven successful to reduce, but not eliminate, cases of disparate treatment in employment. Overall, legislation and litigation have been successful in reducing the issue of discrimination, however legislation must be accompanied by programs to eliminate negative gender stereotypes and perceptions about the value of women's work.

4.5 Conclusion

After presenting the differences and similarities in litigation and legislation enacted to protect working women from harassment and discrimination in Colombia and Canada, this thesis showed that these laws do not lead to substantial equality for working

⁸⁵⁸ *Charter of Human Rights and Freedoms, CQLR c C-12, supra* note 526 at Ch III (2) s 86; *Constitución de Colombia, supra* note 603 at art 13.

⁸⁵⁹ note 775.

⁸⁶⁰ *Concluding Observations on the 7th and 8th reports of Colombia, supra* note 675.; *CEDAW Concluding Observations on 8th and 9th reports of Canada, supra* note 20.

⁸⁶¹ Demeyere, *supra* note 594.

women. Furthermore, there seems to be a gap between international standards and domestic laws, pointing to the impending need of law reform to bridge this gap.⁸⁶²

It is clear that legislation alone is not enough to eliminate the issues caused by inequality.

Laws alone are insufficient to prevent and eliminate discrimination, violence and harassment associated with work, and supplementary equal treatment mechanisms still need to be underpinned by effective remedies, dissuasive sanctions as well as effective enforcement through labour inspection, specialized equality bodies and access to courts. Ultimately, attitudes and social norms need to change, including through the agency of public awareness campaigns.⁸⁶³

There is a need to work on changing pre-established stereotypes about women's roles in the communities they live in, specially about the value of domestic and caretaking work. These changes will only be achieved through education, and awareness programs geared to bring the embedded biases into the minds of lawmakers, adjudicators, employers, men and women. "The responsibility for eliminating unequal treatment and ending violence and harassment falls on all areas of society."⁸⁶⁴ Thus the importance of empowering women through research like this thesis, and inviting new generations to continuously question the laws and programs enacted to achieve the evasive goal of equality for women in the workplace. "Breaking gender stereotypes begins in childhood through education (both formal and informal forms) and outreach."⁸⁶⁵

Legislation, however, has proven effective in Colombia and Canada in reducing gender gaps. Examples of these are: minimum wage legislation, social benefits protection laws, and norms that protect and promote collective bargaining. It is important to note the central role that unions have played in achieving equality for

⁸⁶² Collective bargaining has been successful in negotiating employment conditions that are equitable to all their members regardless of characteristics such as sex, hence the lack of attention by the government to reforming labour laws is being filled by the important work of unions.

⁸⁶³ *Supra* note 259 at 39.

⁸⁶⁴ *Ibid.*

⁸⁶⁵ *Ibid* at 34.

women workers; hence strengthened collective bargaining is imperative in this regard.⁸⁶⁶

To extend the reach of the positive results of legislation, it is important to modify labour and employment laws to protect the work of women in the informal, precarious, and domestic work areas. “a policy mix that mainstreams employment promotion can help to generate better quality and more formal job opportunities, while the regulatory environment can be shaped around the process of formalization through legislation, taxation, rights and other means.”⁸⁶⁷

This thesis presented an important step in the process of achieving equality for women in the workplace, by presenting and comparing legislation enacted in two different legal systems with one mutual goal. This research also showed the global nature of the issue and the difficulties in achieving a goal that has gained international attention for the past century. It also leaves the door open for future feminist scholars, jurists, researchers and policy makers interested in advancing the legal tools available to improve the lives of women by promoting equality and eliminating the gaps caused by discrimination in Canadian and Colombian workplaces. The continuous research and discussions around these topics are of central importance for the successful development of both countries; In the words of Kofi Annan, seventh Secretary-General of UN: “Gender equality is more than a goal in itself. It is a precondition for meeting the challenge of reducing poverty, promoting sustainable development and building good governance.”

⁸⁶⁶ *Ibid* at 38.

⁸⁶⁷ *Ibid*.

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CURRICULUM VITAE

Lina María Hernández Constantín

Education

2017 LL.M Master of Law, Western University, (Candidate) London, Ontario

Thesis research: “Labour and Employment Legislation with Respect to Women Equality Rights in Colombia and Canada” Supervisor: Dr. Valerie Oosterveld

2007 Honours Diploma, Sales and Marketing, Westervelt College, London, Ontario

Average: A+ - Awards: President Honours Role Award for academic excellence

2003 Bachelor of Civil Law, Universidad de La Sabana

Average: A - Awards: 60% Scholarship (every year of study); Teaching Awards: Full coverage of graduation fees by the university.

Thesis research – “Balance de las Investigaciones Realizadas en la Facultad de Derecho de la Universidad de La Sabana entre 1990 – 2002” Supervisor: Dr. Hernán Alejandro Olano García

<http://intellectum.unisabana.edu.co/bitstream/handle/10818/5406/129348.PDF?sequence=1&isAllowed=y>

-Labour Law Certification Course

-Conciliation and Mediation Certification Course

-Minor on International Law

Academic Experience

Panelist to Western’s Transitional Justice and the Law Speaker Series, theme: “Peace for Colombia? – Reconstruction and the FARC Peace Agreement”

Invited speaker to the seminar “Gender and the Law” by Professor Gillian Demeyere, Western University, 2016, “Gender Equity and Canadian Employment and Labour Law”

Invited speaker to panel “Syria and the Refugee Crisis” by Professor Michael Lynk, Western University, 2015

Monitor, Faculty of Law, Universidad de La Sabana in 2002

Collaborator, Faculty of Law, Universidad de La Sabana in 1999

Courses: Civil State and Responsibility (2002), Natural Law (2002), Civil Law Legal Consultancy (2002), General Constitution (1999)

Guest Lecturer, Red de Gestión Humana, 2015, Colombia, “Diversidad una Tendencia que Marca Organizaciones” (Diversity – Changes that have an impact on Organizations)

Professional Experience

Human Resources and Communications Manager, London Cross Cultural Learner Centre, 2011-2017

Human Resources Generalist, Aktiv Kapital Canada, 2008-2011 - Awards: Quarterly Excellence Award, 2008

Law Clerk, Aktiv Kapital Canada, 2010

Human Resources Administrator, Aktiv Kapital Canada, 2007-2008

Labour Relations Analyst, Avianca, 2003

School of Law and Social Studies, Research Assistant, Faculty of Law, Universidad de La Sabana, 2002-2003

Actively participated on the research team and creation of the University’s International Research Multicentre. Investigation focus on Human Rights Law and International Law

Assistant to the Editor of the Law Faculty’s magazine “Dikaion”

Volunteer Experience

Mentor, Western University, Continuing Studies, Human Resources Program, 2017

Member, Education Subcommittee of the London Diversity, Inclusion and Anti-Oppression Advisory Committee, 2017-2019

Member at Large, London Diversity, Inclusion and Anti-Oppression Advisory Committee (DIAAC) – London City Council, 2015-2019

Member, Intercultural Education Committee, London Cross Cultural Learner Centre, 2015-2017

Mentor, Lawrence Kinlin School of Business, Fanshawe College, 2011-2016

Mentor, Bridge Training Program for Foreign Trained Professionals, Lawrence Kinlin School of Business, Fanshawe College, 2013

Non-Academic Distinctions and Honours

City of London recognition for work and dedication to supporting newcomers in the London community, 2016.

Immigration, Refugees and Citizenship Canada, recognition for work in support of the Syrian Refugee Resettlement Initiative 2015-2016.

Leader for “I am London” campaign, London Immigration Partnership (LMLIP), 2014.

Invited Speaker for “I am Joe” campaign, Goodwill Industries, 2014.

Latino Leadership Award, Communications Category, nominee, 2013.

Memberships

Human Resources Professionals Association – London Chapter, 2014

National Attorney’s Register – Superior Judiciary Council, Colombia, member in good standing since 2004